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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

LEVER *v.* GOODWIN.

[1885 L. 699.]

Injunction—Imitation of Plaintiffs' Goods—Form of Account.

C. A.
1886
CHITTY, J.
Dec. 2.
C. A.
1887
May 21, 23, 25.

The Defendants, who were soap manufacturers, brought out their soap in packets so closely resembling those in which the Plaintiffs, who were also soap manufacturers, had been in the habit of bringing out their soap, as to be calculated to deceive purchasers:—

Held, by *Chitty*, J., that although the retail dealers who bought soap from the Defendants would not be deceived, the Defendants by their imitation of the Plaintiffs' packets put into the hands of the retail dealers an instrument of fraud, and ought to be restrained by injunction. An injunction was accordingly granted, and an account was directed of the profits made by the Defendants in selling soap in the form in which it was held that they were not entitled to sell it:

Held, on appeal, that the injunction had been rightly granted, and that the account was in the proper form, and ought not to be limited by excluding from it soap which the retail dealers sold to persons who bought it as the Defendants' soap.

THE Plaintiffs, who were manufacturers of soap, sued the Defendants, who were also soap manufacturers, for alleged infringement of the Plaintiffs' trade-mark, and for selling soap in such wrappers as to pass it off as of the Plaintiffs' manufacture. The case as to the trade-mark failed, the Court holding that the words "*Self-washer*" and "*Self-washing*" were descriptions of the action of the Plaintiffs' soap, and did not constitute a good trade-mark. The Plaintiffs had, however, distinctly brought

C. A.
1887
LEVER
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forward that the Defendants had put their soap on the market in a form which was calculated to lead purchasers to believe that they were purchasing the Plaintiffs' soap. The Plaintiffs had sold their soap to retail dealers in packets not bearing their name, but wrapped up in paper of a peculiar kind called "parchment paper," the use of which was almost entirely confined to them, with spaced printing intituling the soap "*Sunlight Self-washer*," or "*Sunlight Self-washing*." About the beginning of 1885 the Defendants, who did not sell by retail, began to bring out their soap in packets of the same size and shape, in wrappers of the same kind of paper, with spaced printing of the same colour as that of the Plaintiffs, describing the soap as "*Goodwin's Self-washing Soap*." The packets were very similar in general appearance to those of the Plaintiffs, though there was no difficulty in distinguishing one from the other if they were put side by side.

The action came on for hearing before Mr. Justice *Chitty* on the 2nd of December, 1886.

Romer, Q.C., *Lockwood*, Q.C., and *J. Cutler*, for the Plaintiffs.

Aston, Q.C., and *Chadwyck Healey*, for the Defendants, contended that the Defendants were not deceiving anybody, for that they sold only to retail dealers who, of course, knew that they were buying the soap of the Defendants and not of the Plaintiffs, and that the Defendants were not answerable for what the retail dealers did.

CHITTY, J. (after disposing of the question as to the trade-mark, and stating the facts of the case as to the similarity of the packets, continued):—

The law applicable to the case is plain, it is founded on fraud. The simplest case is where the seller misrepresents to the buyer that the goods which are being offered for sale are the goods, not of the person who made them, but of some other manufacturer. That is a case merely between the buyer and seller. Then comes the case where the manufacturer, by devices which are to accompany the goods on their sale in the market, gets them up in such a form as to be calculated to deceive the ultimate buyer into

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the belief that the goods which he, the manufacturer, is putting on the market are the goods of some other maker. Here, generally speaking, a double fraud is committed; first, there is the fraud which is perpetrated on the ultimate buyer; and, secondly, there is a fraud perpetrated on the other manufacturer, who loses part of his trade. In this class of cases the trade is seldom deceived, the retail dealers know from whom they are buying, and if there is a fraudulent device they are rarely taken in by it. But in such a case the manufacturer puts an instrument of fraud into their hands. Now it has been said more than once in this case, that the manufacturer ought not to be held liable for the fraud of the ultimate seller—that is, the shopkeeper or the shopkeeper's assistant; but that is not the true view of the case. The question which I have to try is whether the Defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers.

[His Lordship then stated his reasons for holding that the contention of the Plaintiffs in this respect was well founded, and by his judgment dismissed the action so far as it related to infringement of the trade-mark, but granted an injunction restraining the Defendants from selling, offering for sale, or disposing of any soap not manufactured by or for the Plaintiffs, in the wrapper and of the form of any one of the three exhibits admitted in the action to have been issued by the Defendants, or in any form calculated or intended to pass off or enable others to pass off such soap as and for the goods of the Plaintiffs. The judgment went on to direct "an account of the profits made by the Defendants in selling or disposing of soap made by or for the Defendants in any wrapper such as that contained in the exhibits marked J. S. S. 1, J. S. S. 4, and B. B. 1, and in the form of those exhibits." No question as to the form of this account was raised before Mr. Justice *Chitty*.]

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The Defendants appealed from this judgment, and the appeal was argued on the 21st, 23rd and 25th of May, 1887.

Aston, Q.C., and *Chadwyck Healey*, for the Appellants:—

No injunction ought to have been granted at all. The Plaintiffs have no monopoly in the term "*Self-washing*," in the parchment paper, or in the spaced printing, and the Defendants are at liberty to use them all, and "*Goodwin's Self-washing Soap*" is quite distinct from "*Sunlight Self-washer.*" But supposing an injunction and account ought to be directed, the account ought not to be so wide. It would include soap sold in these wrappers to people who came and asked for the Defendants' soap, and who, therefore, would not be deceived. No damages could be recovered at law unless injury was proved: *Blofeld* v. *Payne* (1). The account should only extend to profits arising from the sale of soap which can be shewn to have been passed off as soap of the Plaintiffs.

[LINDLEY, L.J.:—The utmost you can ask is to have an exception of soap which you can shew to have been bought by the ultimate purchasers as Defendants' soap.]

There is no authority for directing, in a case of this nature, an account in the form of the account which has been directed. The case of infringement of a trade-mark is not the same as a case of trespass on mines or of infringing a patent. In the latter cases, every step of the Defendant is a damage to the Plaintiff, but it cannot be inferred that every one who bought the Defendants' soap would have bought the Plaintiffs' soap if the Defendants had not passed off their soap for that of the Plaintiffs: *Leather Cloth Company* v. *Hirschfield* (2); *Davenport* v. *Rylands* (3). What the Defendants have done may not have injured the Plaintiffs at all.

Romer, Q.C., *Lockwood*, Q.C., and *John Cutler*, for the Plaintiffs, were desired by the Court to confine themselves to the question as to the proposed exclusion of soap which the Defendants could shew to have been sold as theirs:—

Such a modification of the account is wholly unprecedented, and would be very inconvenient. The point was never raised below and it now takes us by surprise at the close of the argument for the Appellants. The same question, however, appears to have been raised in *Edelsten* v. *Edelsten* (4). It is seen (5) what was the form of the account directed, and Lord *Westbury* expressly declined to narrow it.

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(1) 4 B. & Ad. 410.
(2) Law Rep. 1 Eq. 299.
(3) Law Rep. 1 Eq. 302.
(4) 1 D. J. & S. 185, 196.
(5) 1 D. J. & S. 189.

COTTON, L.J.:—

There are two questions here: first of all, whether Mr. Justice *Chitty* was right in granting an injunction against the Defendants; secondly, if that be decided against the Appellants, what ought to have been the form of the decree as regards profits?

Now consider what this case is. Undoubtedly it is complicated by the fact that when the Plaintiffs, who are wholesale manufacturers of soap, commenced their action, they were on the register for, and considered themselves entitled to the trade-mark of the words "*Self-washer*" and "*Self-washing*." They claimed to protect that trade-mark by their action; but it was not a proper trade-mark, and has since that time been struck off the register. But then the Plaintiffs also raised this case: "You, the Defendants, are selling your soap in a wrapper and dress which represent it to be our soap, and therefore, on the old common law doctrine, enforced in Courts of Equity by injunction, we ask to restrain you from passing off your goods as our goods." [His Lordship then stated the facts as to the adoption by the Defendants, about the end of 1884, of a way of making up their soap in packets having a great general resemblance to those of the Plaintiffs.]

Now what was the contention on behalf of the Defendants? Looking at the two tablets, one cannot but see that there is a strong general resemblance between them, and especially to the eyes of people who cannot read. But Mr. *Aston's* contention was this: there is no trade-mark in "*Self-washing*" or "*Self-washer*;" there is no monopoly in this parchment paper; there is no monopoly in the spaced printing; then why should we be restrained, in carrying on business, from using those things as to which the Plaintiffs cannot claim any monopoly? That is an obvious fallacy. There may be no monopoly at all in the individual things, but if they are so combined by the Defendants as to pass off the Defendants' goods as the Plaintiffs', then the Defendants have brought themselves within the old common law doctrine in respect of which equity will give to the aggrieved party an injunction in order to restrain the Defendants from passing off their goods as those of the Plaintiffs.

Is there then here enough to shew that the Defendants' soap was represented as manufactured by the Plaintiffs? It is in evidence that, as a matter of fact, up to this time soap for sale had scarcely ever been wrapped in parchment paper, except by the Plaintiffs. It is in evidence also that, although this spaced printing was used as regards groceries, it was not used as regards soap except by the Plaintiffs. That being so, can we come to any other conclusion than this,—that the use of this paper and the use of this particular printing was intended to represent these goods as the goods of the Plaintiffs, which had become known in the market, and would, in my opinion, induce people who do not when they buy an article look carefully to see what the particular mark or name upon it is, to consider when they got handed down to them one of the tablets of the Defendants in this new dress, that they were getting the same soap as they had been accustomed to buy in this kind of packet. The principal argument on the part of Mr. *Aston* was this:—That the essential marks in the two packets are "*Sunlight Self-washer*" in the one case, "*Goodwin's Self-washing Soap*" in the other; and that the name is that which would guide every one who bought this soap. In my opinion, that will not hold. It is very true that *Goodwin's* name appears as the maker or the wholesale seller of this particular soap, but it is quite contrary to experience, and quite contrary to the evidence, to suppose that every one, when buying a packet of tabular soap, would look to the name for the purpose of determining whether what he has bought is that which he has been accustomed to buy in a very similar packet. I do not for a moment suggest that the Plaintiffs could have absolutely restrained the use of the words "*Self-washing*," nor do I say that they could absolutely have restrained the Defendants from having the spaced printing, or from the use of parchment paper; but when we find that, as regards soap for sale, they were almost exclusively used by the Plaintiffs, we cannot but see that this combination is calculated to induce people to believe that what they were buying, which was the Defendants' soap, was what they had known and appreciated, namely, the Plaintiffs' soap.

In my opinion, therefore, the injunction was right.

Then, ought there to be an alteration as regards the account of profits? Mr. *Healey* referred us to cases on the question of damages. In my opinion those cases are not relevant to the question as to the form of the account of profits. It is well known that, both in trade-mark cases and patent cases, the plaintiff is entitled, if he succeeds in getting an injunction, to take either of two forms of relief; he may either say, "I claim from you the damage I have sustained from your wrongful act," or "I claim from you the profit which you have made by your wrongful act." Mr. *Chadwyck Healey* contended that the only profit which the Plaintiff could call for was that profit which arose from the sale of this soap where the ultimate purchaser bought it, not as the Defendants', but as the Plaintiffs' soap. But, in my opinion, that is mistaking the whole gist of this action. The Defendants, as I understand, do not sell anything to retail purchasers, what they sell they sell to middlemen, that is to say, to people who purchase from them as wholesale merchants, and who are going to sell it by retail; and the complaint against the Defendants is this: "You have dressed up your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it to the ultimate purchasers as the soap of the Plaintiffs." The profit for which the Defendants must account is the profit which they have made by the sale of soap in that fraudulent dress to the middlemen. It is immaterial how the middlemen deal with it. If they find it for their benefit not to use it fraudulently, but to sell the soap to the purchasers from them as *Goodwin's*, that cannot affect the question whether the sale by the Defendants to those middlemen of this soap in a fraudulent dress was a wrongful act. It still remains a wrongful act, because it put into the hands of the middlemen the means of committing a fraud on the Plaintiffs by selling the soap of the Defendants as the soap of the Plaintiffs.

In my opinion, therefore, the account of profits is right as it stands.

LINDLEY, L.J.:—

I am of the same opinion.

As to the main question, I think the case is plain and easy,

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and it may be rested upon the Defendants' own evidence and upon the appearance of the packages. What is called the general "get-up," which is an expression used by some of the witnesses, is so similar that obviously the one might easily be mistaken for the other. Of course, in all these cases there are differences as well as resemblances, and the question, so far as the packages are concerned, must always be decided by contrasting the striking resemblances with the striking differences. Now, the only difference which strikes me at all is this: that *Goodwin* has substituted the word "*Goodwin*," in large letters, for "*Sunlight*." That is the whole difference which catches the eye. Then look at the resemblances; look at the paper; look at the printing; look at the blank space, and the catch-words; look at the whole thing, and it is impossible not to arrive at the conclusion, not only that one was intended to pass for the other, but that that intention has been realised. I say that apart from the evidence. Then if you look at the evidence, it comes out clearly and strongly that the Defendants' soap is often bought under the belief that it is the Plaintiffs' soap, and it is of no use to point out the differences, which of course may be perceived when attention is drawn to them.

The question raised by Mr. *Chadwyck Healey* as to profits and the form of the account struck me as somewhat novel, and deserving of attention; but having looked at *Edelsten* v. *Edelsten* (1), and having regard to the reasons given in the judgment of Lord *Westbury* in that case, I am satisfied that Mr. Justice *Chitty* was right, and for the reasons which have been given I am of opinion that the appeal fails.

BOWEN, L.J.:—

I am of the same opinion.

Solicitor for Plaintiffs: *Salaman.*

Solicitors for Defendants: *Emmet, Son, & Stubbs,* agents for *A. & G. W. Fox, Manchester.*

H. C. J.

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(1) 1 D. J. & S. 185.

WEBSTER *v.* SOUTHEY.

[1886 W. 2302.]

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May 3, 4, 16.

Lease—Workhouse—Poor, relief of—"Charitable Use"—Mortmain—Non-enrolment—Reservation to Grantor—Rent, non-payment of—43 *Eliz. c.* 4 [*Revised Ed. Statutes, vol. i. p.* 674]—*Poor Law Act*, 1722 (9 *Geo.* 1, *c.* 7), *s.* 4 [*Revised Ed. Statutes, vol. ii. p.* 306]—*Mortmain Act* (9 *Geo.* 2, *c.* 36) [*Revised Ed. Statutes, vol. ii. p.* 403]—*Statute of Limitations* (3 *&* 4 *Will.* 4, *c.* 27) [*Revised Ed. Statutes, vol. vii. p.* 387]—*Poor Law Act*, 1844 (7 *&* 8 *Vict. c.* 101), *s.* 73 [*Revised Ed. Statutes, vol. ix. p.* 477].

By a lease dated in 1747—after reciting that the inhabitants of the parish of *G.* had resolved to build a workhouse for the better reception and employment of the poor of the parish, and had applied to the lessor for a lease of the land demised, and that the lessor, "in order to encourage so good a work," had consented to grant the lease—a piece of land was demised for a term of 150 years to commence from a day fifteen days later than the date of the lease, at the yearly rent of 1*s.*, to several persons, one of whom was the vicar of *G.*, in trust that the lessees might build a workhouse upon the land "for the better reception and employment and for the lodging and entertainment only of all the poor people of the parish of *G.* for the time being during the said term, in such manner as they, or the major part of them, shall think fit, at the proper costs and charges of the inhabitants of the said parish of *G.*, or otherwise, and not to be let, mortgaged for money, or assigned, to any other use, intent or purpose whatsoever." And it was agreed that, if the inhabitants should discontinue the prescribed use of the building so to be erected, and should be willing to deliver it to the landlord, it should be lawful for them to do so, he paying to the churchwardens or overseers of the parish the then value of the building. The deed was not enrolled under the *Mortmain Act*, 1736 (9 Geo. 2, c. 36). A workhouse was duly erected on the demised land pursuant to the lease.

In 1862, the workhouse, being no longer required, was pulled down, and no rent having been paid under the lease since 1776, the site was conveyed to a purchaser in fee under the Act 5 & 6 Will. 4, c. 69, enabling parish authorities to sell the sites of disused workhouses.

An action having been brought by a person claiming to be the reversioner against persons—as alleged assigns of the lease—claiming under the purchase of 1862, to recover the arrears of rent:—

Held, that the lease was a lease for "charitable uses:" that it failed to comply with the requirements of the *Mortmain Act* in that, besides non-enrolment, it did not take effect in possession and contained reservations in favour of the grantor in the shape of rent and something in the nature of a right of pre-emption: that these defects were not cured by sect. 73 of the *Poor Law Act*, 1844 (7 & 8 Vict. c. 101), that Act curing only one defect, namely, want of enrolment: and that the lease was accordingly

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void *ab initio*, and that the *Statute of Limitations* began to run against the grantor, if not from the execution of the lease, at all events from the time the rent ceased to be paid.

Action dismissed with costs.

Semble, land acquired by parish officers to enable them to perform their statutory obligations as, for instance, by providing a workhouse, is land acquired for a "charitable use."

Burnaby v. *Barsby* (1) questioned.

BY an indenture of lease dated the 10th of March, 1747, between Sir *Thomas Webster*, Bart. (a parishioner of *East Grinstead*, *Sussex*), of the one part, and seven persons therein named, one of whom was the vicar of *East Grinstead*, of the other part; after reciting that "the inhabitants of the said parish of *East Grinstead* have come to a resolution to build a workhouse for the better reception and employment of the poor of the said parish, and therefore have requested and desired the said Sir *Thomas Webster* to grant unto them a certain piece of land hereafter mentioned, which the said Sir *Thomas Webster*, in order to encourage so good a work hath consented to do in such manner as is hereinafter particularly expressed," it was witnessed that the said Sir *Thomas Webster*, for the consideration aforesaid, and also for and in consideration of the yearly rent of 1*s*. to be paid to him as thereinafter mentioned, and for other good considerations, demised to the said parties of the other part a piece or parcel of land therein described, known as "*Bedlam's Bank*," in the said parish of *East Grinstead*, and containing about one acre, to hold unto the same parties, and the survivors and survivor of them, his executors, administrators and assigns, from the 25th of March then next for the term of 150 years, in trust that the lessees "and the survivor of them, his executors, administrators, and, assigns may erect, build and continue a workhouse upon the said piece or parcel of land for the better reception and employment and for the lodging and entertainment only of all the poor people of the said parish of *East Grinstead* for the time being during the said term in such manner as they (the lessees) or the major part of them shall think fit at the proper costs and charges of the inhabitants of the said parish of *East Grinstead*, or otherwise, and not to be let, mortgaged for money or assigned to any other use, intent or purpose whatsoever," at the yearly rent of 1*s.* payable on the 25th of March in every year if demanded. And it was covenanted and agreed between the parties "that in case the inhabitants of the said parish of *East Grinstead* shall think proper at any time during the continuance of this present term not to make use of the said building (so to be erected) for the reception, employment, lodging and entertainment of the poor people of the said parish, but are willing and desirous to deliver the same into the hands of the said Sir *Thomas Webster*, his heirs or assigns, before the end and expiration thereof, that then and in such case it shall and may be lawful to and for the said" lessees or the executors, administrators or assigns of the survivor, "to deliver up this present indenture into the hands of the said Sir *Thomas Webster*, his heirs or assigns, he, the said Sir *Thomas Webster*, his heirs or assigns, paying into the hands of the churchwardens and overseers of the poor of the said parish of *East Grinstead*, for the use of the said parish, such sums of money as the said building then standing on the said premises shall be adjudged to be worth by two skilful workmen, one to be chosen by the said parish, the other by the said Sir *Thomas Webster*, his heirs or assigns, and that from thenceforth the term hereby granted shall cease, determine, and become void to all intents and purposes whatsoever."

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(1) 4 H. & N. 690.

None of the lessees named in the lease were therein referred to as, nor did it appear whether any of them were in fact, churchwardens, overseers or guardians of the poor of the parish of *East Grinstead*.

The lease was not enrolled under the *Mortmain Act*, 1736 (9 Geo. 2, c. 36).

The lessees entered into possession of the piece of land comprised in the lease, erected thereon a building in accordance with the trusts of the lease, and continued to use such building as a workhouse for the parish of *East Grinstead* up to the year 1862.

In 1776 a sum of £1 9*s.* was paid for twenty-nine years' arrears of rent under the lease, the receipt for the same being indorsed on the lease and stating that it had been "received of *East Grinstead* parish." There was no evidence as to whether, since that date, any further rent had been paid.

In 1862 the guardians of *East Grinstead Union*, finding they no longer required the workhouse, pulled it down, and, acting under the powers of the Act 5 & 6 Will. 4, c. 69, which enables parish authorities to dispose of the sites of disused workhouses, sold and conveyed the site as "freehold" to one *Turner* in fee, and in 1864 it was again sold and conveyed in fee simple in separate plots to the three defendants *Southey*, *Bridgland* and *Pink*, who built houses and shops on them. The Plaintiff, Sir *Augustus Webster*, succeeded to the baronetcy and family estates in 1886, when the question was raised as to the title to the land comprised in the lease. To have this question decided he brought this action, in form, for the recovery of 1*s.*, being one year's rent claimed to be due under the lease at Lady Day, 1886, the Plaintiff alleging in his statement of claim that the lessees entered into possession of the land comprised in the lease "on behalf of the parish of *East Grinstead*;" that the Defendants were in occupation under the lease; that he, the Plaintiff, was the owner of the land in fee simple, subject to the lease, and that he had demanded from the Defendants the last year's rent due under the lease, but that they had refused to pay the same.

In their statement of defence the Defendants maintained that the lease was void for non-enrolment under the *Mortmain Act*, and denied that the lessees entered into possession "on behalf of the parish." They also alleged that in 1864 they severally purchased parts of the land for value as freehold, and had since laid out large sums of money in the erection of buildings thereon, and that the Plaintiff, by himself or by his agent, had always known of such expenditure and had stood by and acquiesced therein. They then denied the Plaintiff's title either to the land or the rent, and asserted that if any rent was paid prior to or in 1776, it was paid only as on a mere yearly tenancy in point of law; that the Defendants or their predecessors in title had been in actual possession or receipt of the rents and profits of the land severally conveyed to the Defendants for far more than twenty years before the institution of the action without payment of any rent or making any acknowledgment of title to the Plaintiff or his predecessors in title; and the Defendants claimed the benefit of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), and the *Real Property Limitation Act*, 1874.

In his reply the Plaintiff joined issue on the defence, and in reply to the Defendants' plea of the *Statute of Mortmain*, pleaded sect. 73 of the *Poor Law Act*, 1844 (7 & 8 Vict. c. 101).

The action now came on for trial.

Admissions in writing had been agreed upon between the parties to the effect that Sir *Thomas Webster*, the lessor, was at the date of the lease seised in fee simple of the land demised, and that, assuming the lease to be now valid and subsisting, the reversion in fee was vested in the Plaintiff.

Sir *Horace Davey*, Q.C., *Elton*, Q.C., and *Jemmett*, for the Plaintiff:—

As to the defence that the Plaintiff is barred by non-payment of rent for twenty years and upwards, it is settled that during the subsistence of a lease the landlord's right to rent is not barred by non-payment: *Archbold* v. *Scully* (1).

[*Rigby*, Q.C., for the Defendants:—We admit that that is so, if the lease is a valid one: our contention is that it is invalid.]

Then, as to the defence that the lease is void on the ground that it was a conveyance or assurance to charitable uses under the *Mortmain Act* (9 Geo. 2, c. 36), and was not enrolled as required by that Act, we admit that, if this was a lease for charitable purposes within the meaning of that Act, and enrolment was essential, the case cannot be distinguished from *President and Governors of Magdalen Hospital* v. *Knotts* (2). The first question is, was this a lease for charitable purposes within the *Mortmain Act?* The lease was made to certain persons as trustees for the purpose of erecting a workhouse: that is to say, it was an acquisition of land on behalf of the inhabitants of a parish, acting through their officers, to enable them to perform their statutory duties of providing a workhouse for and relieving the poor of the parish. At the date of this lease in 1747, the law relating to the relief of the poor stood as follows. The first compulsory Poor Law Statute was 43 Eliz. c. 2 (1601); all the previous statutes being permissive only. Section 1 of that statute directed the churchwardens and overseers of a parish to levy rates on the

(1) 9 H. L. C. 360.

(2) 4 App. Cas. 324.

inhabitants of a parish towards the relief of the poor: and sect. 2 provided for the erection of cottages on manorial wastes for the impotent poor. Then the statute 9 Geo. 1, c. 7 (1722), s. 4, gave enlarged powers of providing workhouses, by enabling churchwardens and overseers to "purchase or hire" houses in which to lodge or employ the poor. We say that it was in pursuance of the duties imposed on the parish authorities by the latter statute that this lease was taken and the land acquired on behalf of the parish: and it has been decided that the acquisition of land by overseers or other public officers, as representing the inhabitants of a parish, for a statutory purpose and under statutory obligations, is not taking land for a "charitable use" within the meaning of the statute 43 Eliz. c. 4: *Burnaby* v. *Barsby* (1).

That a large landowner and an inhabitant of a parish is willing to permit the parish officers in discharge of their statutory duties to hire at a nominal rent certain land for the purposes of a workhouse, does not make it land for a "charitable use." In point of fact a workhouse is not a "charity" in the legal sense. There is no authority that a conveyance of land for erecting a workhouse is a conveyance to charitable uses. From *Bunting* v. *Sargent* (2) the scope of the *Mortmain Acts* would seem to be an open question. Here the lease was not to a corporation but only to individuals, and it is therefore not affected by the restrictions imposed on corporations.

There is no such stringency in the law of mortmain as to prohibit every gift for charitable purposes except on the fulfilment of certain statutory conditions. The Act was directed only against improvident gifts to charity: *Stewart's Blackstone* (3). A gift for erecting a workhouse is not improvident, and is not, we submit, a gift to charity.

Then as to the second question. Even assuming that the lease was a conveyance or assurance to charitable uses and therefore required enrolment under the *Mortmain Act* (9 Geo. 2, c. 36) (1736), we submit that the defect of non-enrolment was cured by the *Poor Law Act*, 1844 (7 & 8 Vict. c. 101), amending 4 & 5 Will. 4, c. 76. Sect. 73, which is retrospective, enacts that where

(1) 4 H. & N. 690.

(2) 13 Ch. D. 330, 337.

(3) Vol. ii. p. 357.

any messuages, lands, or hereditaments have been conveyed or assured to or in trust for churchwardens, overseers, or guardians in any parish or parishes, or otherwise for the benefit of any parish or parishes, or to or in trust for the guardians of any union, for the purpose of providing a workhouse or workhouses, every such conveyance or assurance shall be deemed good and valid for all purposes whatsoever, notwithstanding that it has not been enrolled under 9 Geo. 2, c. 36. The object of this section was to quiet and put an end to all doubts respecting the validity of unenrolled leases and conveyances for a workhouse.

They were then proceeding to argue as to the effect of sect. 73 of the *Poor Law Act*, 1844, on the defence set up by the Defendants that the Plaintiff was barred from re-entry by the *Statute of Limitations.*

[*Rigby,* Q.C. :—We do not rely on that point at all.]

Rigby, Q.C., *Renshaw,* Q.C., and *F. Thompson,* for the Defendants :—

The question whether the trust created by this deed was a charitable trust within the *Mortmain Act* would be unarguable were it not for the case of *Burnaby* v. *Barsby* (1), which, however, is contradicted by all the authorities. Prior to 43 Eliz. c. 4, there were numerous Acts providing for the relief of the poor, as, for instance, the Act 14 Eliz. c. 5. Then the Act 18 Eliz. c. 3 provided for "setting the poor on work" and for houses of correction in every county; and the Act 39 Eliz. c. 5 empowered persons to provide hospitals, *maisons de Dieu,* abiding places or houses of correction for the relief of the poor "so as to set the poor to work." The most common form of charity in those days was to give land or money for houses of correction or abiding houses for the poor in relief of the rates raiseable under the various Poor Law Acts; and accordingly such gifts as those of money "for relief of aged, impotent, and poor people . . . for or towards relief, stock, or maintenance for houses of correction," are by the preamble of 43 Eliz. c. 4 treated as "charitable." So in the present case, this lease, being a grant in aid of poor-rates, is a grant to "charitable uses" within that statute. The build-

(1) 4 H. & N. 690.

ing erected under the lease was not a workhouse in the technical sense, but was in reality an almshouse or hospital into which all poor persons in the parish requiring relief might be admitted. It did not fall within the statute 9 Geo. 1, c. 7, enabling parish authorities to "purchase or hire" houses in which to lodge or employ the poor. Until the *Mortmain Act* the policy of the law was to encourage gifts to charitable uses and especially to promote the erection of workhouses, and therefore the Legislature from time to time gave increased powers for persons to grant and parish authorities to acquire land for such objects. But that policy was changed by the *Mortmain Act,* 9 Geo. 2, c. 36. By sect. 1 of that Act all assurances of lands for "charitable uses" are rendered void unless made by deed enrolled, "and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

This lease or assurance transgresses that statute in four respects: first, it is not enrolled; secondly, it does not take effect in "possession immediately from the making thereof," for it is not to commence until after the expiration of fourteen days from the date thereof; thirdly, it contains a "reservation" of a yearly rent to the grantor; and, fourthly, it contains a "condition, clause or agreement for the benefit of the grantor" in the shape of a provision for the surrender of the lease in case the workhouse ceased to be required during the term. Sect. 73 of the *Poor Law Act,* 1844 (7 & 8 Vict. c. 101) cures only one defect, that of non-enrolment, and only applies to conveyances or assurances "to or in trust for the churchwardens and overseers of the poor, or the overseers only, or the guardians of any parish or parishes respectively, or otherwise for the benefit of any parish or parishes respectively, or to or in trust for the guardians of any union, for the purpose of providing a workhouse," &c. Here the assurance was not in trust either for the churchwardens, or overseers, or guardians. It was made for certain public purposes in the parish; and it has been held that a gift for "public purposes" within a parish is a gift for such public purposes within the parish as are charitable: *Dolan* v. *Macdermot* (1). In *Burnaby* v. *Barsby* (2) none of the authorities were cited, and the decision has never been recognised as law. It was not cited as an authority in *Luckraft* v. *Pridham* (3), which is directly in conflict with it, for there the Court of Appeal held that a gift to a corporation to enable it to perform statutory duties, such as providing relief for the poor, was a charitable gift, and therefore not exempted from the operation of the *Mortmain Act.* It is now clearly settled that a gift of land or money in reduction of rates or for the relief of the poor is a gift for a charitable purpose within the meaning of the *Mortmain Act*: *Attorney-General* v. *Blizard* (4); *Attorney-General* v. *Corporation of Berwick-on-Tweed* (5); *In re St. Botolph Without Bishopsgate Parish Estates* (6).

[KAY, J., referred to *Attorney-General* v. *Bushby* (7).]

A trust of this kind can only be upheld, if at all, on the ground of its being a charitable trust: *Attorney-General* v. *Webster* (8); *Thomson* v. *Shakespeare* (9). If, then, this is a charitable trust, as we say the authorities clearly shew it to be, the case is, as the Plaintiff in fact admits, covered by *President and Governors of Magdalen Hospital* v. *Knotts* (10).

Sir *H. Davey*, in reply:—

The recital in the lease is sufficient to shew that the parties intended to act within sect. 4 of the statute 9 Geo. 1, c. 7, and it is clear from the operative part of the deed that they were in fact acting under the powers of that section, for it follows the language of the section in declaring a trust for the erection of a workhouse for the "employment" and "lodging" of the poor of the parish. I submit that *Burnaby* v. *Barsby* is a sound decision, and not inconsistent with the authorities that have been cited. The foundation of that case is that a hiring of land by parish officers for the purpose of performing their statutory obligations is not such an endowment for charitable uses as is struck at by the *Mortmain*

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(1) Law Rep. 3 Ch. 676.
(2) 4 H. & N. 690.
(3) 6 Ch. D. 205.
(4) 21 Beav. 233, 248.
(5) Tam. 239.
(6) 35 Ch. D. 142.
(7) 24 Beav. 299.
(8) Law Rep. 20 Eq. 483.
(9) Joh. 612.
(10) 4 App. Cas. 324.

Act (9 Geo. 2, c. 36). This is not a charitable use at all, but a hiring by the parishioners, by trustees as their officers, of certain land to enable them to perform their statutory duties. The word "workhouse" used in this lease, though not used in 9 Geo. 1, c. 7—neither is it used in 39 Eliz. c. 5—is a good term for a house which parish authorities are authorized to hire for the purposes mentioned in the former of those Acts. As to the lessees not being churchwardens, overseers, or guardians, there is nothing to shew that they were not; and considering that the cost of erecting the workhouse would fall entirely on the poor-rate, I ask the Court to presume they filled one or other of those offices. The deed in fact shews that it was an arrangement with the "churchwardens and overseers" of *East Grinstead*, for it provides for the surrender of the lease to the lessor on his paying to them, and to no other persons, for the use of the parish, the value of the property. Even assuming that this deed was a grant or gift in reduction of rates, and therefore created a charitable use, and required enrolment under the *Mortmain Act*, sect. 73 of 7 & 8 Vict. c. 101, does apply, since the section comprises assurances to or in trust for churchwardens, "or otherwise for the benefit of any parish or parishes." The words of the section are wide enough to cover, not only a defect for want of enrolment, but any defect arising from non-compliance with any of the requirements of the *Mortmain Act*. As to the argument that the lease does not take effect "in possession" as required by the *Mortmain Act*, the Plaintiff should shew that it was actually executed before the 25th of March. Until entry is made under a lease there is no legal demise—only an *interesse termini*: so that until the lease took effect on the 25th of March there was no demise at all. It is not sufficient to allege a lease without shewing that the lessee entered under it. Then, as to the final clause in the lease, that is not a reservation or agreement for the benefit of the lessor but of the lessees, to enable them to get rid of the lease if it became useless; just as, in the case of a mining lease, power is reserved to the lessee to surrender the lease if he cannot work at a profit.

1887. May 16. KAY, J.:—

This action is brought to recover arrears of rent by a person claiming to be entitled to the reversion against the Defendants as alleged lessees, or rather assigns, of the lease. The rent is of nominal amount, being 1*s.* a year. The real question is the Plaintiff's title to the reversion. The Defendants plead the *Statute of Limitations.* It is admitted that this plea cannot prevail if the lease was a valid one, because the term has not expired; and it was decided in *Archbold* v. *Scully* (1) that time would not begin to run against a landlord upon rent being withheld, but only upon its being paid to another, which is not the case here. But then it was also admitted that if the lease was originally void, as is suggested in this case, by reason of its not being in conformity with the *Mortmain Act* (9 Geo. 2, c. 36), the *Statute of Limitations* would be a bar, according to the decision in *President and Governors of Magdalen Hospital* v. *Knotts* (2). Sect. 1 of 9 Geo. 2, c. 36, commonly called the *Mortmain Act,* enacts, "that from and after the 24th of June, 1736, no . . . lands . . . shall be given, granted, aliened," &c., to "any person or persons, bodies politic or corporate, or otherwise, for any estate . . . in trust, or for the benefit of any charitable uses whatsoever unless" by deed enrolled twelve months before the death of the grantor and within six months after its execution, "and, unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

The assurance in this case is a lease by deed dated the 10th of March, 1747, of one acre of land for 150 years at a rent of 1*s.* a year, if demanded. It cannot be proved that any rent has been paid since 1776. In 1862 the property was purported to be conveyed by the lessees in fee simple, and the present Defendants claim under such conveyance. Admissions have been made under which I must assume that the Plaintiff's title to the reversion, if the lease be subsisting, is good.

The question whether the lease was valid depends upon two considerations:—(1) Was this a lease for charitable uses; and (2), if it was, are the defects cured by the 73rd section of 7 & 8 Vict. c. 101?

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(1) 9 H. L. C. 360.

(2) 4 App. Cas. 324.

The lease is to this effect. It is between Sir *Thomas Webster* of the one part and several persons, including the vicar of *East Grinstead*, of the other part. It recites that the inhabitants of the parish of *East Grinstead* had come to a resolution to build a workhouse for the better reception and employment of the poor of the said parish and had applied for a lease of this land, and that Sir *T. Webster*, "in order to encourage so good a work," had consented to grant that lease. Then the lease is granted in trust that the lessees, and the survivor, his executors, administrators, and assigns, might build and continue a workhouse upon the land "for the better reception and employment and for the lodging and entertainment only of all the poor people of the said parish of *East Grinstead* for the time being during the said term in such manner as they or the major part of them shall think fit at the proper costs and charges of the inhabitants of the said parish of *East Grinstead*, or otherwise, and not to be let, mortgaged for money or assigned to any other use, intent or purpose whatsoever." The term was not to begin from the date of the deed, but from the 25th of March, that is, fifteen days later. The lease also contained a provision that if the inhabitants should discontinue the prescribed use of the building so to be erected, and should be willing to deliver it to the landlord, it should be lawful for them to do so, he paying the then value of the building to the churchwardens and overseers of the poor of the parish for the use of the parish. The deed was not enrolled.

That this was a charitable use seems at first sight indisputable. Reliance, however, is placed upon the case of *Burnaby* v. *Barsby* (1).

In that case, by deed, in 1822, land was conveyed to the use of the grantor and his wife for lives, and after the death of the survivor to the use of certain persons, who were described as respectively overseers of the poor of *Hungarton* and churchwardens of the same parish, in fee in consideration of £30, moneys of the inhabitants of the said parish; and the conveyance was expressed to be "in trust only that they should permit the premises thereby granted to be used and enjoyed as a poor or parish house, to place

(1) 4 H. & N. 690.

such pauper or paupers therein of or belonging to the parish of *Hungarton* for the time being; or to any other use or purpose, as the churchwardens and overseers of the poor for the time being, or the major part of them, with the consent and approbation of the majority of the parishioners and inhabitants of the said parish, assembled at a parish or vestry meeting, should think fit."

The question was whether this was a charitable use. During the argument no cases on the subject seem to have been cited, but Baron *Martin* observed it might be different if it were in the way of charity, but the purchase was made by the overseers for the purpose of providing lawful relief; and it seems to have been suggested that the effect of the 8th section of the 59 Geo. 3, c. 12, which enabled churchwardens and overseers by direction of the vestry to build a workhouse, and to purchase or take on lease any ground in the parish for that purpose, was to empower parish officers to take as other people could without reference to the *Mortmain Acts*. Sect. 9 of that statute empowered them to sell existing workhouses and employ the proceeds in building new ones. After consideration the Court decided that the conveyance was not to charitable uses, Baron *Watson*, who delivered the judgment of the Court, saying (1), "We are of opinion, after looking through the statutes, that this does not come in any way within the description of 'charitable uses' as enumerated in the statute 43rd of Elizabeth. The churchwardens and overseers purchased for a limited purpose with a power for conveying away; the land was not to remain to them for ever: and there is nothing in the statute of *Elizabeth* to lead to the conclusion that the use would be a charitable use within the meaning of that Act. The purchase was under the immediate direction of an Act of Parliament, which says it shall be lawful for churchwardens and overseers to purchase and to sell again. For these reasons we think it does not fall in any way within the meaning of the *Statutes of Mortmain*."

It has been argued before me that this decision shews that where land is acquired to enable the officers of a parish to perform their parish duties, as, for example, by providing a workhouse, that is not a charitable use. No other authority has been cited for that proposition, and it certainly seems somewhat difficult to maintain it. If that be the law, any one might convey or devise by will land to the officers of a parish to enable them to fulfil their public duties to the poor, and a conveyance for this purpose need not be enrolled, and, notwithstanding the *Mortmain Act*, might contain reservations in favour of the grantor, and might be made to take effect in favour of the parish officers upon his death, or at any other deferred period.

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(1) 4 H. & N. 695.

The 43 Eliz. c. 4, expressly enumerates as charitable uses "relief of aged, impotent, and poor people, . . . relief, stock or maintenance for houses of correction, . . . aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes." Looked upon only as a legal, public, or general purpose, it is difficult to reconcile this decision with the judgment of Sir *J. Leach* in *Attorney-General* v. *Heelis* (1), or with *Doe* v. *Howells* (2), *Attorney-General* v. *Blizard* (3), or *Attorney-General* v. *Bushby* (4), or with the recent case of *Luckraft* v. *Pridham* (5).

If the case depended upon this consideration, I should have to determine whether I must follow *Burnaby* v. *Barsby* (6) or a long series of decisions which at present seem to me inconsistent with it. The *Mortmain Act* avoids the assurance and places the grantor, as well as the grantee, under a positive disability. Statutes which remove the disability of a grantee by authorizing a corporation or other public body to acquire land, do not, unless expressly so worded, interfere with the disability of the grantor to grant. This was decided so long ago as the case of *Mogg* v. *Hodges* (7). Power to take land in such cases is given to avoid the necessity of obtaining a license to hold in mortmain: but, nevertheless, the grantor can only grant in the manner prescribed by 9 Geo. 2, c. 36.

The ruling *Poor Law Act* at the date of the lease in this case was 9 Geo. 1, c. 7 (1722), which provides, by sect. 4, that for the greater ease of parishes in the relief of the poor it should be lawful for the churchwardens and overseers of the poor in any parish, with the consent of the major part of the parishioners in vestry or other parish or public meeting for that purpose assembled, to purchase or hire any house or houses in the same parish, and to contract with any person or persons for the lodging, keeping, maintaining, and employing any or all such poor in the parish as shall desire to receive relief or collection from the same parish, and there to keep, maintain, and employ all such poor persons. But this lease was made after the *Mortmain Act* (9 Geo. 2, c. 36); and although the churchwardens and overseers might be empowered by 9 Geo. 1, c. 7, to take a lease, there is nothing which could remove the disability of the grantor to grant such a lease occasioned by the *Mortmain Act* which had passed meanwhile.

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(1) 2 S. & S. 67.
(2) 2 B. & Ad. 744.
(3) 21 Beav. 233.
(4) 24 Beav. 299.
(5) 6 Ch. D. 205.
(6) 4 H. & N. 690.
(7) 2 Ves. Sen. 52.

But then reference is made to the 7 & 8 Vict. c. 101, the *Poor Law Amendment Act*, s. 73 of which enacts "That in all cases where any messuages, lands, or hereditaments, or any estates or interest therein, have or hath been conveyed or assured, or purported to be conveyed or assured, either gratuitously or for valuable consideration, to or in trust for the churchwardens and overseers of the poor, or the overseers only, or the guardians of any parish or parishes respectively, or otherwise for the benefit of any parish or parishes respectively, or to or in trust for the guardians of any union, for the purpose of providing a workhouse or asylum, or workhouses or asylums, for the accommodation of the poor of such parish or parishes or union respectively, every such conveyance or assurance shall be deemed good and valid for all purposes whatsoever, notwithstanding that such conveyance or conveyances have not been enrolled pursuant to the statute passed in the ninth year of the reign of his late Majesty King *George* II., intituled 'An Act to restrain the disposition of lands whereby the same became inalienable.'"

It is argued that if this was a charitable use the defects in the lease may be cured by that section; but the section only cures one defect, that is, the want of enrolment. In this case the lease, as I have stated it, does not seem to be made to the churchwardens and overseers of the poor. It was probably a beneficial lease, as appears from the expression in the recital that it was granted in order to encourage so good a work, and from the reservation of the rent of 1*s.* a year, which was obviously only a nominal rent. It was not to take effect in possession from the date of it, but from fifteen days later; and, besides the rent, it reserves to the grantor something in the nature of a right of pre-emption if the prescribed use of the building to be erected should be discontinued. The trust was primarily for a workhouse at the cost of the inhabitants of the parish "or otherwise." Whatever may be said as to the conveyance in the case of *Burnaby* v. *Barsby* (1), I have no doubt whatever that the lease in this case was for charitable purposes. It fails to comply with the *Mortmain Act*, not merely for want of enrolment, but in the other respects which I have pointed out, and therefore it is not saved from the effect of that statute by the 7 & 8 Vict. c. 101, s. 73. I have examined the subsequent Act of 9 Geo. 4, c. 85, which in the case of the purchase for full and valuable consideration of lands for charitable purposes, if made to take effect in possession and without any reservation, makes such purchase valid, notwithstanding the non-observance of the other formalities prescribed by the *Mortmain Act*; also the 24 Vict. c. 9, which makes the reservation of a peppercorn, or other nominal rent, immaterial. But this provision only refers to assurances thereafter to be made. This same statute and the 25 Vict. c. 17, 27 Vict. c. 13, the 29 & 30 Vict. c. 57, and the 35 & 36 Vict. c. 24, enable the Court, where full and valuable consideration was given, to supply the want of enrolment. The 25 Vict. c. 17, contains a provision to the effect that any money expended in building on the land may be treated as part of such full and valuable consideration. But no advantage has been, or probably can now be, taken of these provisions. None of these statutes assist the Plaintiff's case. Consequently the lease was void *ab initio*, and the *Statute of Limitations* began to run against the grantor, if not from its execution, at any rate from the time when rent ceased to be paid.

The result is that this action fails, and must be dismissed with costs.

Solicitors: *Hasties & Crawfurd; R. C. Adams Beck.*

G. I. F. C.

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(1) 4 H. & N. 690.

MAGNUS *v.* QUEENSLAND NATIONAL BANK.

[1885 M. 1616.]

KAY, J.

1887

June 16, 20, 25.

Mortgagor and Mortgagee—Bank—Loan to Customer—Transfer by three Persons to secure Loan—Re-transfer to Nominee of Customer—Liability of Bank for consequent Loss.

G., a stockbroker, who was one of three trustees, proposed to his co-trustees to sell certain *B.* stock belonging to the trust and purchase *N. E.* stock with the proceeds. In order to carry out this change of investment the co-trustees concurred with *G.* in executing a deed of transfer of the *B.* stock. The transfer was for a nominal consideration in favour of two persons named, who were in fact trustees for a bank of which *G.* was a customer. *G.* handed the transfer to the bank as part security for a loan by them to him. The bank believed that *G.* had authority to pledge the stock with them. The transfer was duly registered, after the usual notices had been sent to the transferors. *G.* paid off the loan, and the bank, instead of causing the stock to be re-transferred to the three transferors, and without giving notice to the co-trustees of *G.*, caused the stock to be transferred to purchasers from *G.* *G.* received the purchase-money, and therewith bought *N. E.* stock, but in his sole name; he afterwards sold such stock and appropriated the proceeds to his own use. In his accounts subsequently delivered to his co-trustees, he included the *N. E.* stock as part of the trust funds, and he from time to time paid to the *cestuis que trust* sums by way of dividend on such stock. He subsequently absconded, and became bankrupt. In an action by his co-trustees against the bank:—

Held, that the bank when the loan was paid off were in a fiduciary position towards the three mortgagors, and were bound to take care that the *B.* stock was re-transferred to them or to some one to whom they authorised it to be re-transferred; that the authority conferred on *G.* by the transfer executed by his co-trustees was at most an authority to sell to the bank or their trustees; that therefore the act of the bank in transferring to the nominees of *G.* was a breach of their duty to the mortgagors; that such breach of duty was the cause of the loss by depriving the trust of the *B.* stock and enabling *G.* to act as he did, and that the bank were liable for the value of the *B.* stock at the time when they transferred it.

BARTLE GOLDSMID and the Plaintiffs Sir *Philip Magnus* and *F. B. Halford* were the trustees under the will of Sir *F. H. Goldsmid*, deceased, of a legacy of £70,000 bequeathed upon certain trusts in favour of the Plaintiff, the Countess *D'Avigdor*, during her life and of her children.

The investments representing the £70,000 comprised a sum of £7828 *London, Brighton, and South Coast Railway* perpetual

4½ per cent. debenture stock, standing in the names of the three trustees.

Bartle Goldsmid was a stockbroker, and acted as the broker of the trustees in making changes of investments and selling portions of the trust funds to raise moneys required under the trusts of the will. He was the acting trustee and had the entire confidence of his co-trustees.

On the 26th of January, 1882, *Bartle Goldsmid* wrote to the Plaintiff *Magnus* proposing that the *Brighton* stock should be sold and the proceeds invested in *North-Eastern* preference stock.

The Plaintiff *Halford* did not see this letter, but he admitted in cross-examination that he knew of the proposal to change the investment about that time.

On the 27th of January, 1882, the Plaintiffs *Magnus* and *Halford* at the instance of *Bartle Goldsmid* concurred with him in signing a deed of transfer of that date, whereby, in consideration of 5*s.*, *Bartle Goldsmid* and *Magnus* and *Halford* purported to transfer £7828 *London, Brighton, and South Coast Railway* perpetual 4½ per cent. debenture stock to the Defendants *R. D. Buchanan* and *S. T. Smith.*

It was alleged by the Plaintiffs that the date, the consideration, and the amount of stock to be transferred were in blank when the transfer was signed. This allegation, however, was not substantiated in evidence, as neither *Magnus* nor *Halford* could remember authorizing the sale of the stock or having signed the transfer, although they admitted the genuineness of their signatures.

Bartle Goldsmid was a customer of the Defendants, the *Queensland National Bank, Limited,* and was in the habit of borrowing money from them from time to time for the settlement days on the *Stock Exchange,* and of depositing securities to cover such advances.

Bartle Goldsmid borrowed of the bank the sum of £50,000 for his private purposes, and on the 27th of January, 1882, he took the deed of transfer to the bank and deposited the same with them, together with the certificate of the stock thereby assigned, as security or part security for the loan.

The Defendant *Buchanan* was the manager, and the Defendant

Smith the accountant, of the bank, and they were transferees in the character of trustees for the bank.

The deed of transfer and certificate were duly sent to the *London, Brighton, and South Coast Railway Company* for registration. The company sent to *Magnus* and *Halford* the usual notice that the transfer had been lodged for registration, and, no objection to such registration being made, they subsequently registered the transfer.

On behalf of the Defendants the bank and *Buchanan* and *Smith*, it was alleged that the transfer was duly filled in when it was brought to the bank; that *Bartle Goldsmid* represented to them and they believed that *Magnus* and *Halford* had authorized him to give the stock to the bank as security; that such an authority would be in the ordinary course of business, and that there was nothing to lead anyone to doubt the truth of the representation, supported as it was by the deed of transfer and certificate.

In February, 1882, *Bartle Goldsmid* paid off the loan made to him by the bank. The stock, however, was not re-transferred to the three transferors, *Goldsmid*, *Magnus*, and *Halford*, but *Buchanan* and *Smith*, by the direction of the bank, without communicating with *Magnus* and *Halford*, on the 15th of February, 1882, transferred the *Brighton* stock to purchasers from *Goldsmid* by three transfers of £5000, £2000, and £828 stock respectively.

Bartle Goldsmid received the purchase-money from the purchasers of the *Brighton* stock, and in April and May, 1882, invested the same in the purchase, in his own name, of £8700 *North-Eastern Railway* preference stock. He paid the amount of the dividends on the *North-Eastern* stock to the Countess *D'Avigdor*.

On the 16th of August, 1883, *Bartle Goldsmid* sold the *North-Eastern* stock and appropriated the proceeds. He continued, however, for some time to pay sums by way of dividend on such stock to the Countess *D'Avigdor*.

In October, 1884, *Bartle Goldsmid* sent to *Magnus* and *Halford* statements of the investments of the trust funds. In these he represented that the *Brighton* stock had been sold, that £8700 *North-Eastern* stock had been bought with the proceeds, and that the last-mentioned stock still formed part of the trust funds.

This was the first and only information which *Magnus* and *Halford* had on the subject. Having confidence in *Goldsmid* they never inquired in whose names the *North-Eastern* stock was standing, or asked to see the certificate thereof.

In March, 1885, one of the sons of the Countess *D'Avigdor* complained to *Halford* that the dividends payable to the Countess were irregularly paid by *Goldsmid*, and this was the first intimation of any irregularity which his co-trustees received. *Halford* then made inquiries, the effect of which was that *Goldsmid* absconded. He was afterwards made bankrupt.

On the 2nd of May, 1885, by an order made by Vice-Chancellor *Bacon* under the *Trustee Acts*, the right to sue for and recover all *choses in action* subject to the trusts of the legacy of £70,000 was vested in *Magnus* and *Halford*.

On the 13th of May, 1885, this action was brought by *Magnus* and *Halford* and the Countess *D'Avigdor* and her two sons against the bank, *Buchanan* and *Smith*, and the *London, Brighton, and South Coast Railway Company*, claiming (1) a declaration that the transfer of the 27th of January, 1882, was void, and an order directing the same to be cancelled; (2) an order directing the railway company to register the £7828 *Brighton* stock in the names of the Plaintiffs *Magnus* and *Halford*; or (3) in the alternative, an order directing the Defendants the bank, and *Buchanan* and *Smith*, to account for the value of the said stock on the 27th of January, 1882, and to pay the same to the Plaintiffs *Magnus* and *Halford*.

During the argument it was admitted at the bar that no relief could be given against the railway company, and that the action against them must be dismissed.

Ince, Q.C., Sir *H. Davey*, Q.C., and *G. Henderson*, for the Plaintiffs:—

The bank failed in their duty as mortgagees by allowing the *Brighton* stock to be re-transferred into the name of the nominees of *Goldsmid* instead of into the names of *Goldsmid* and his co-trustees, who were the mortgagors. A mortgagee who is paid off is in a fiduciary position to the mortgagors, and is bound to see that upon reconveyance their rights are preserved: *Pearce* v.

Morris (1); *Hall* v. *Heward* (2). The only authority which his co-trustees gave to *Goldsmid* was to sell the *Brighton* stock in the regular way, and for that purpose they signed the transfer. They never authorized him to use the transfer as a mortgage and deposit it with the bank. The circumstance of such authority being given cannot relieve the bank from their liability for the consequences of their breach of duty which occasioned the loss of the *Brighton* stock to the trust funds.

Rigby, Q.C., and *Farwell,* for the Defendants the *Queensland National Bank,* and *R. D. Buchanan* and *S. T. Smith*:—

There was no breach of duty on the part of the bank. It is clear that the proposal of *Goldsmid* that there should be a change of investment was known and acceded to by both his co-trustees. They cannot excuse themselves by saying that they put confidence in *Goldsmid.* They must take the consequences of so doing. They resolved to sell the *Brighton* stock through him as their broker, and that, of course, involved power to him to receive the purchase-money. Under the authority given to him he sold the stock, as he had a perfect right to do, and directed the bank to transfer to the purchasers.

[KAY, J.:—The authority given to *Goldsmid* was exhausted by the transfer to the nominees of the bank, and when the loan was paid off the bank became trustees of the stock for the mortgagors according to *Cholmondeley* v. *Clinton* (3).]

All that the bank did was to enable *Goldsmid* to receive the purchase-money, which he had full authority from his co-trustees to do. Even supposing that the bank had no right to assume that he had power to sell the stock, yet if in fact he had such power that cures the defect. *Goldsmid* had a right to direct the transfer to be made, not back again to the trustees, which would have been a useless expense, but to the purchasers to whom the stock was sold in accordance with the intention of all parties.

But even if there was a breach of duty on the part of the bank, yet they are not liable, because their act did not occasion the loss. *Goldsmid* invested the proceeds of the *Brighton* stock in the *North-Eastern* stock, which he was instructed to purchase. Then was committed the breach of trust which occasioned the loss. Instead of having the stock so purchased transferred into the names of the three trustees, as it was his duty to do, he took the transfer in his own name. Until then there was no breach of trust by any one. The co-trustees of *Goldsmid* never took the ordinary precaution of inquiring in whose names the *North-Eastern* stock was; had they done so, the loss would never have occurred. It was not by reason of the mortgage to the bank, nor by reason of the purchase of the *North-Eastern* stock, which was authorized, that the loss took place, but by reason of the unauthorized act of *Goldsmid* in taking the transfer in his own name. Dividends were received on the *North-Eastern* stock, and it was accepted by all parties as the equivalent of the *Brighton* stock which was sold. In truth there has been no loss to the trust of the *Brighton* stock, with which alone the bank were concerned; the loss has been of *North-Eastern* stock, with which the Plaintiffs do not connect the bank in any way.

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(1) Law Rep. 5 Ch. 227.

(2) 32 Ch. D. 430.

(3) 2 Jac. & W. 1, 186.

Further, it is part of the Plaintiffs' case that the transfer was not filled in until after its execution. If so, it was void: *Hibblewhite* v. *M'Morine* (1); *Société Générale de Paris* v. *Walker* (2); *Easton* v. *London Joint Stock Bank* (3). Therefore the bank never got the *Brighton* stock, and consequently could not transfer it; and the parties liable, if any, must be the railway company, who took the names of the trustees off their register upon a void transfer.

Renshaw, Q.C., and *Ingle Joyce*, for the Defendants, the railway company.

Ince, in reply:—

The evidence of the authority given to *Goldsmid* by his co-trustees is the transfer of the 27th of January, 1882. It was not an authority to sell generally, but only to sell to *Buchanan* and *Smith*, the transferees. When, therefore, the transfer was executed, and the certificate handed over, the authority was spent, and there was an end of it. What the bank subsequently did was entirely outside the authority. It is part of the bank's case that they believed the transfer was given in order that the stock should be mortgaged to them, that is, they knew that a part of the legal interest in the stock had been transferred by the co-trustees. The bank, therefore, must have known that it was their duty to re-transfer the stock to the three mortgagors. There was no contributory negligence on the part of the trustees. The negligence was when the bank chose to re-transfer to one only of the three mortgagors.

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(1) 6 M. & W. 200.

(2) 11 App. Cas. 20.

(3) 34 Ch. D. 95.

It must be taken that the transfer was filled in before execution, and the cases last cited have therefore no application.

1887. June 25. Kay, J.:—

On the 27th of January, 1882, *Bartle Goldsmid* took to the *Queensland National Bank*, who are Defendants to this action, a deed of transfer of that date of certain *London and Brighton* stock. In this deed *Goldsmid* and the Plaintiffs, Sir *Philip Magnus* and *F. B. Halford*, were the three transferors, and the Defendants *R. D. Buchanan* and *S. T. Smith* were the transferees, in the character, as is admitted, of trustees for the bank. The consideration mentioned in the deed was 5*s.* It was duly executed by all three transferors. The stock transferred by it was £7828 *London and Brighton* 4½ per cent. debenture stock, the value of which was considerable; and the transaction between *Goldsmid* and the bank was that he borrowed of the bank £50,000 for his private purposes, and handed them this deed and the certificate of the stock thereby assigned as security or part security for the loan. This loan was paid off in February, 1882. The bank, however, did not re-transfer to the three mortgagors, but, by their direction, *Buchanan* and *Smith*, their trustees, without any communication with the other mortgagors, on the 15th of February, 1882, transferred the *London and Brighton* stock to purchasers from *Goldsmid* and handed over the certificate, thus passing to such purchasers the legal interest in the stock and enabling *Goldsmid* to receive the purchase-moneys. These moneys *Goldsmid* invested in the purchase in his own name of £8700 *North-Eastern Railway* preference stock in April and May,

1882. On the 16th of August, 1883, *Goldsmid* sold the *North-Eastern* stock and appropriated the proceeds. He subsequently absconded and was made bankrupt.

There can be no doubt that a mortgagee, after his debt is paid off, is in a fiduciary position towards the mortgagor with respect to the satisfied security. This was decided in *Cholmondeley* v. *Clinton* (1), where Sir *T. Plumer* says there is an implied trust "to surrender the estate to the person entitled to demand it;" and the doctrine has always since been recognised. It was followed in, amongst other cases, *Pearce* v. *Morris* (2). The satisfied mortgagee owes a duty to the mortgagors. He is bound to take care that the security gets back to the mortgagors, or to some one to whom they authorize it to be reconveyed.

This point was scarcely contested in the argument before me. But the argument has been chiefly addressed to shew that this duty was in fact fulfilled in the present case, for it was urged that, although the bank did not know it, *Goldsmid* had a general authority from the other mortgagors to sell at the time when he actually sold, and that therefore the transfer by way of assignment of these shares to the purchaser from *Goldsmid* was just as though the bank had reconveyed to the mortgagors. The validity of this defence depends upon the question whether *Goldsmid* had any such authority to sell. The facts are these—*Goldsmid* and his co-mortgagors, Sir *Philip Magnus* and *F. B. Halford*, were trustees of the *London and Brighton* stock upon trust for the Countess *D'Avigdor* for life, with remainder to her children. *Goldsmid* was a stockbroker and was the acting trustee. He was in the habit of suggesting and carrying out changes of the investments of the trust, which comprised other securities to a large amount. On the 26th of January, 1882, he wrote to Sir *P. Magnus* proposing that the *London and Brighton* stock should be sold and the proceeds invested in *North-Eastern* preference stock. Mr. *Halford*, the other trustee, did not see this letter, but he admits that he knew of the proposal to change the investment about that time; and as both he and Sir *P. Magnus* executed the transfer of the 27th of January there is no doubt that this was executed to carry out this change of investment by selling the *London and*

(1) 2 Jac. & W. 1, 186.

(2) Law Rep. 5 Ch. 227.

Brighton stock and buying *North-Eastern* with the proceeds. In October, 1884—that is, more than a year after he had sold the *North-Eastern* stock—*Goldsmid* sent to *Magnus*, at his request, and also to *Halford*, statements of the investments. In these he represented that the *London and Brighton* stock had been sold, that £8700 *North-Eastern* had been bought with the proceeds, and that this stock still formed part of the trust fund, and this was the first and only information they had on the subject. In the meantime he had been paying dividends on the *North-Eastern* stock to the Countess. In March, 1885, the son of the Countess *D'Avigdor* complained to Mr. *Halford* of the irregularity of *Goldsmid* in paying the dividends on his mother's money, and *Halford* then made inquiries, the effect of which was that *Goldsmid* absconded. On the 2nd of May, 1885, by an order made under the *Trustee Act*, the right to sue for and recover all *choses in action* subject to this trust was vested in Sir *P. Magnus* and Mr. *Halford*, the other trustees; and on the 13th of that month this action was brought by those two trustees, and the Countess and her children as co-Plaintiffs, against the bank, *Buchanan* and *Smith*, the trustees of the mortgage which they took, and against the *London and Brighton Railway Company*, seeking to make the bank account for the value of the *London and Brighton* stock.

Now, is it the result of these circumstances that, at the time when the bank transferred the *London and Brighton* stock to the purchaser from *Goldsmid*, that person had authority to sell? The only evidence of his authority is the deed of the 27th of January, 1882. The only authority he had was conferred by that deed. If the names of *Buchanan* and *Smith* had not been filled in as transferees before the transferors executed the deed, it would have been void: *Hibblewhite* v. *M'Morine* (1); *Société Générale de Paris* v. *Walker* (2). In that case it would not have conferred any authority on *Goldsmid*. The bank state that these names were filled in and the deed was complete when deposited with them. The only possible inference from the evidence before me is that they were filled in before the deed was executed by the transferors. It may be doubted whether the deed really conferred an authority to sell, as the consideration expressed in it was only

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(1) 6 M. & W. 200.

(2) 11 App. Cas. 20, 28.

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5*s.*; but if it did, it was an authority to sell to *Buchanan* and *Smith,* or to the Defendant bank, for whom they were trustees. But the bank did not buy, and the sale to the actual purchaser was entirely without any authority of the co-trustees of *Goldsmid.* Therefore, the action of the bank in permitting their trustees to assign the legal interest in this stock, and part with the certificates to the actual purchasers from *Goldsmid,* was a distinct breach of their duty to the three mortgagors, and was not, as suggested, accidentally right because *Goldsmid* had a general authority to sell. He had no authority to sell to anyone unless it was to the bank.

The action of the bank was all the more inexcusable because they state in paragraph 4 of their defence—and even without such admission it must be inferred—that they understood *Goldsmid's* authority was not to sell to the bank, but only to mortgage. They must, therefore, have known that when the mortgage was paid off his authority was exhausted; that they were bound to re-transfer to the three mortgagors.

It has been argued that this breach of duty by the bank was not the proximate cause of the loss; that *Goldsmid* did re-invest the proceeds of sale in *North-Eastern* stock; that although the investment was in his sole name it might have been claimed by the trustees; and that it was the subsequent sale of the *North-Eastern* stock and misappropriation of the proceeds by *Goldsmid* which caused a loss to the trust. The answer is plain. Though, as against *Goldsmid,* the *North-Eastern* stock might have been claimed, it was never properly invested or secured to the trust. It was the breach of duty of the bank that actually took the *London and Brighton* stock from the trustees by transferring the legal interest in it to the purchasers from *Goldsmid* and handing over the certificates. If it be argued that *Goldsmid* might have appropriated to his own use the purchase-money if the bank had bought the *London and Brighton* stock, the answer is, that is a mere speculation which cannot possibly excuse the failure of duty of the bank. In the events that have happened, that failure of duty has deprived the trust of the *London and Brighton* stock.

Much of the argument has been addressed to shew that the co-trustees of *Goldsmid* were guilty of great negligence. That, if it were true, is quite beside the question, unless it were neglect which had occasioned the loss. But if they were justified in employing *Goldsmid* as their broker, there was no negligence in signing a transfer to persons to whom he represented he had sold. This would be according to the ordinary course of business which—as recognised in *Ex parte Belchier* (1) and in the recent case of *Speight* v. *Gaunt* (2)—trustees are justified in adopting. So, if they were employing him to re-invest, it would be usual to give him the command of the proceeds of sale for that purpose. No doubt they ought to have been vigilant to see that the re-investment was properly made. But no negligence on their part in any way caused the loss. The immediate cause was the dishonesty of *Goldsmid*. But the actual opportunity of acting dishonestly, of which he availed himself, was given to him by the breach of duty of the bank. The dishonest act—the actual breach of trust—was selling the *London and Brighton* stock as he did without authority. In this act the bank concurred.

The case, stated shortly, is this. A customer of a bank borrows money of them and hands to them as security a transfer of railway stock by himself and two other persons, his co-trustees. Subsequently he pays off the loan, and the bank, instead of re-transferring to the three mortgagors, transfer to a nominee of their customer. That, for the purpose of this case, is precisely as though they had transferred to himself or to any stranger. Thereby the stock was lost to the trust.

In my opinion the bank are liable for the value of the *London and Brighton* stock at the time when they transferred it. I suppose this value may be taken to be the price obtained by *Goldsmid*. There must be judgment against them for that amount, with interest at 4 per cent. from the date when the Countess ceased to receive the dividends, and the costs of the action.

No relief is asked against the railway company. The action must be dismissed against them, with costs.

Solicitors: *Futvoye, Field & Baker*; *Stretton, Hilliard, Dale & Newman*; *Norton, Rose, Norton & Co.*

(1) Amb. 218.

(2) 9 App. Cas. 1.

C. C. M. D.

CHITTY, J.

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May 3, 4, 5, 10, 11, 25.

COLONIAL BANK *v.* HEPWORTH.

[1884 C. 650.]

Company — Shares — Share Certificates —Blank Transfer—Blank Power of Attorney—Deposit of Certificates—Estoppel.

The *New York Central Railroad Company* issue to the registered shareholders share certificates; each certificate is for ten shares, and on the back there is a blank form of transfer, and a blank form of power of attorney to execute a surrender and cancellation of the certificate.

The mode of transfer is as follows: The transfer and power of attorney are signed by the registered shareholder. When this blank transfer reaches the hand of some holder who desires to be registered his name is filled in by himself or on his behalf, and the certificate is left with the company; it is then cancelled, the transferee is registered, and a new certificate in his name is issued.

In August, 1883, *T. & Co.*, as the brokers of the Defendant, purchased for him on the market certain shares in the *New York Central Railroad Company*. The certificates were permitted by the Defendant to remain with *T. & Co.*

In November, 1883, *T. & Co.* deposited with the Plaintiffs (with other securities) the certificates for the shares so purchased by them for the Defendant as security for a large sum borrowed by them from the bank. On the 11th of December following the bank re-delivered to *T. & Co.* the certificates for the shares on the ground that they were desirous of sending them in for registration; and on the same day *T. & Co.* filled in the name and address of the Defendant on the blank transfers and forms of surrender of the same certificates as the person in whose name the shares were to be registered. The new certificates were made out in the Defendant's name, and were ready for issue on the 20th of December. The blank transfers on the back of these certificates were never signed by the Defendant.

On the 11th of December, when *T. & Co.* handed the certificates to the agents of the company for registration, they received from them a receipt which they then sent to the Plaintiffs, which receipt the Plaintiffs kept till the beginning of February, 1884, when, having learnt that a member of the firm of *T. & Co.* had absconded, they sent a clerk to the agents with the receipt, and obtained from them the new certificates for the shares which up to the commencement of the action remained in their possession.

The Plaintiffs claimed a declaration that they were entitled to the shares:—

Held, that the case did not fall within the principle of estoppel, and that the Defendant was the legal owner of the shares, and entitled to have the new certificates handed to him.

No estoppel can be raised on a document inconsistent with the document itself.

The right principle to adopt with reference to documents such as the certificates with blank transfers duly signed by the registered holders is that each prior holder confers on the *bonâ fide* holders for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority, and to this extent, but no further, is estopped from denying the title of such holder for the time being.

By delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to the legal estate in the shares or to the complete dominion over them.

THE *New York Central Railroad Company* issue to the registered shareholders certificates duly authenticated by the signatures of the president and treasurer. Each certificate is for ten shares and states that the person named therein is entitled to ten shares of the company's capital stock. It states also that the shares are transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate in the form and manner which may at the time be required by the transfer regulations of the company. On the back of each certificate is a blank form of transfer and a blank form of power of attorney to execute a surrender and cancellation of such certificate, and to do all things requisite to transfer the shares represented thereby on the books of the company.

The mode of transfer is as follows:—the transfer and power of attorney are signed by the registered shareholder whose name appears on the face of the certificate and his signature is attested by a witness. The name of the transferee is filled in, and the documents are taken to the office of the company; the certificates are surrendered and cancelled and a new certificate is issued to the transferee whose name has been entered on the register. The usual practice is for the transferor to sign the transfer and power of attorney without filling in the names of the transferee and attorney; these blank transfers pass from hand to hand by delivery only until they reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf. The documents are then left with the company, the certificates are cancelled, the transferee is registered and new certificates in his name are issued as above described.

On the 27th of August, 1883, the Defendant purchased on the *London Stock Exchange*, through Messrs. *P. W. Thomas & Co.*, his brokers, 230 shares in the *New York Central Railroad*

Company for £5474. The usual bought note was on that day sent by *Thomas & Co.* to the Defendant, and on the 28th of August the Defendant forwarded to them his cheque for £5502 15*s.*, being the price of the said shares and commission.

In due course *Thomas & Co.* received from the persons from whom they bought the shares for the Defendant the certificates for the shares indorsed by the registered holders and paid to them the purchase-money, which they had received from the Defendant. On the 13th of September, 1883, *Thomas & Co.* received from the persons from whom they bought the dividend of £92 18*s.* which had been paid on the shares since the purchase to the then registered owners, and which they forwarded to the Defendant on the 1st of October, 1883, informing him that they had been unable to register his shares in time to enable him to receive such dividend, but that they would as soon as the books of the company re-opened proceed with the registration.

On the 4th of October, 1883, the Defendant purchased through his said brokers ten additional shares in the same company for £236 10*s.*, and on the 6th of October forwarded to them his cheque for £237 15*s.*, being the price of the said shares and commission. *Thomas & Co.* in due course paid to the person from whom they bought the purchase-money for the said ten shares, and received from him the certificate for the same duly indorsed by the registered holder.

The certificates for the 230 shares and the 10 shares were allowed by the Defendant to be retained by *Thomas & Co.* for the purposes of registration.

On the 29th of November, 1883, *Thomas & Co.* deposited with the Plaintiffs, to secure the balance then due and thereafter to become due from them to the Plaintiffs, the certificates for the 230 shares so purchased by them for the Defendant together with other securities. The shares comprised in the certificates were when so handed over to the Plaintiffs registered in the company's books in several different names, and the transfers and powers of attorney indorsed on each of such certificates had been executed by the person or firm in whose name the shares comprised in such certificates were registered as transferor, the name of the transferee and proposed attorney being in each case left in blank.

On the 11th of December, 1883, the Plaintiffs re-delivered to *Thomas & Co.* the certificates for the 230 shares, in pursuance of a request made to them in writing by *Thomas & Co.*, in which they stated that they were desirous of sending them in for registration before the books closed on the next day, and that they would hand to the bank the receipt that afternoon.

On the same day *Thomas & Co.* filled in the name and address of the Defendant in the blank transfers for 240 shares and handed in these certificates and the transfers and surrender then filled in to Messrs. *J. S. Morgan & Co.*, the fiscal agents of the railroad company in *England*, for registration in the Defendant's name.

The 240 shares were duly registered in the Defendant's name on or as on the 11th of December, 1883, in the register in *London* and subsequently in the *New York* register. New certificates were made out in the Defendant's name and were ready for issue on the 20th of December, but the blank transfers on these new certificates were never signed by the Defendant.

On the 11th of December, when *Thomas & Co.* handed in the certificates and surrender to Messrs. *Morgan & Co.*, they received from them a ticket or receipt for the surrender which they in the afternoon of the same day delivered to the Plaintiffs.

This ticket the Plaintiffs kept till the beginning of February, 1884, when, having learnt that a member of the firm of *Thomas & Co.* had absconded, they sent a clerk to the office of Messrs. *Morgan & Co.* with the ticket to obtain the new certificates, and Messrs. *Morgan & Co.* delivered such certificates to him without any inquiry, and the same were retained by the Plaintiffs.

The Plaintiffs, by their statement of claim, claimed a declaration that they were entitled to the shares then standing in the name of the Defendant and that he might be ordered to execute the transfers and powers of attorney indorsed on the certificates for the shares, and to do and concur in all things necessary for procuring the same to be registered in the names of the Plaintiffs or their nominees.

The Defendant by counter-claim claimed delivery to him by the Plaintiffs of the certificates and damages.

Witnesses were examined at great length. The result of the evidence and the further facts fully appear in the judgment.

CHITTY. J, 1887 COLONIAL BANK v. HEPWORTH.

Rigby, Q.C., Sir *A. Watson*, Q.C., and *Butcher*, for the Plaintiffs:—

The question is one between two innocent parties, which shall suffer for the fraud or mistake of the brokers. The transfer of the shares is governed by American law, and by that law the delivery of the certificates with the power of attorney indorsed, signed by the registered owners, passes not merely the equitable, but the legal title to the shares. When these certificates were deposited with the bank by *Thomas & Co.* for value the bank acquired the legal and equitable title, and the subsequent fraud of their broker in availing himself of the possession of the certificates, which he was bound to register either in his own name, as trustee for the bank, or in the name of a nominee of the bank, cannot be relied upon by the Defendant as giving him a good legal title: *Heath* v. *Crealock* (1). By the usage of bankers and brokers and the mercantile world in the city of *London*, the certificates with indorsed powers of attorney are treated as passing the shares by delivery, and accepted as negotiable instruments: *Goodwin* v. *Robarts* (2); *Rumball* v. *Metropolitan Bank* (3); and even if the bank, from their dealings with *Thomas & Co.*, knew or had reason to believe that the securities deposited were or might be those of their customers, they were justified in assuming that they had power to pledge them: *Easton* v. *London Joint Stock Bank* (4). Before the deposit of the share certificates at the bank there was no appropriation of those shares to the Defendant by his brokers *Thomas & Co.*, and the subsequent registration of the same in his name was not a dealing for value between him and his brokers on which he could rely as displacing the title which the bank had acquired by the deposit of the certificates as security for the advances made by them to *Thomas & Co.* The Defendant cannot rely on the title he has obtained by the registration, which as against us is fraudulent: *Dodds* v. *Hills* (5); *Carter* v. *Carter* (6); *Mumford* v. *Stohwasser* (7).

[They also referred to *Shropshire Union Railways and Canal*

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(1) Law Rep. 10 Ch. 22.

(2) 1 App. Cas. 476.

(3) 2 Q. B. D. 194.

(4) 34 Ch. D. 95.

(5) 2 H. & M. 424.

(6) 3 K. & J. 617.

(7) Law Rep. 18 Eq. 556.

Company v. *Reg.* (1); *Société Générale de Paris* v. *Walker* (2); *Colonial Bank* v. *Whinney* (3); *Burra* v. *Ricardo* (4); *Tindall* v. *Barnetts* (5).]

Romer, Q.C., *Finlay*, Q.C., and *Grosvenor Woods*, for the Defendant:—

The Plaintiffs have not shewn that the share certificates bought by the brokers for the Defendant, and in respect of which the new certificates now in possession of the Plaintiffs were issued, had in fact been deposited with the Plaintiffs, the evidence of the clerks of the bank as to the numbers not being reliable; but the Defendant has proved that the certificates which were given up to the company when the new certificates were obtained were those representing the shares purchased by the brokers for the Defendant and paid for by him. Even by the American law the legal title to the shares does not pass by mere delivery of the certificates, although in certain cases under the doctrine of estoppel the person who has enabled the certificates to be dealt with for value is not allowed to deny the title of an assignee for value without notice, but no case can be found in the American reports in which a person who has become, like the Defendant, registered in the books of the company as owner of the shares for which he had paid, has been held to be deprived of his title by reason of some intermediate dealing with the certificates.

Even if the case were governed by the law of the State of *New York*, the Defendant as registered owner has the legal title.

But the rights of the parties must, as they depend on a transfer made in *England*, be governed by English law: *Smallpage's Case* (6); *Lee* v. *Abdy* (7). Even if the certificates were negotiable in *New York*, which was disproved by the evidence, that would not make them negotiable here: *Picker* v. *London and County Banking Company* (8). By our law such certificates would not have the character of negotiable instruments: *Crouch* v. *Credit Foncier of England* (9). The evidence fell far short of establishing a usage

(1) Law Rep. 7 H. L. 496.
(2) 11 App. Cas. 20.
(3) Ibid. 426.
(4) Cab. & Ellis 478.
(5) 3 Times L. R. 476.
(6) 30 Ch. D. 598.
(7) 17 Q. B. D. 309.
(8) 18 Q. B. D. 515.
(9) Law Rep. 8 Q. B. 374.

which could bind a person in the position of the Defendant, as it did not go beyond that of dealings on the *Stock Exchange* and between bankers and customers in whom the banks had confidence, and it was not shewn that any case had ever occurred in which the custom had been relied on and submitted to.

This case is different from that of *Easton* v. *London Joint Stock Bank* (1), the Defendant here knowing nothing of any alleged or apparent negotiability of the shares, or of the character of the certificates; but whatever view the Court may take of the negotiability of the certificates or the effect of the deposit by *Thomas & Co.* into the bank, the Defendant had a legal title to the shares, and in equity better than, or at least as good as, that of the bank; and if the Defendant's title to the shares bought for him and for which he had paid could be taken away and given to the bank by the fraud of his brokers, the title so acquired by the bank could be taken away from them and restored to him by acts which might be a fraud on them, but were mere restitution to the Defendant of what was his property, and even if there was no appropriation of the shares to him before the deposit into the bank, the subsequent appropriation in satisfaction of the obligation of the brokers to the Defendant to carry out their contract with him was a transaction for valuable consideration on which he, being entirely innocent of any fraud, had a right to rely.

[They also referred to *Pilcher* v. *Rawlins* (2); *Pearson* v. *Scott* (3); *Northern Counties of England Fire Insurance Company* v. *Whipp* (4); *Taylor* v. *Blakelock* (5); *In re Richardson* (6); *Manners* v. *Mew* (7); *In re Cooper* (8); *Shropshire Union Railways and Canal Company* v. *Reg.* (9).]

Rigby, in reply:—

On the evidence it is not proved that the purchasers of the shares, the certificates of which had been deposited with the bank, had been made on behalf of the Defendant, there being nothing in the bought note sent to him to identify the numbers, and the

(1) 34 Ch. D. 95.
(2) Law Rep. 7 Ch. 259.
(3) 9 Ch. D. 198.
(4) 26 Ch. D. 482.
(5) 32 Ch. D. 560.
(6) 30 Ch. D. 396.
(7) 29 Ch. D. 725.
(8) 20 Ch. D. 611.
(9) Law Rep. 7 H. L. 496.

day for completion of the purchase of the shares mentioned in the bought note not agreeing with that deposed to by the members of the jobbers' firm.

[The following American cases were cited or referred to in the course of the argument: *McNeil* v. *Tenth National Bank* (1); *Schuyler* v. *New York and New Haven Railway Company* (2); *Kortright* v. *Commercial Bank of Buffalo* (3); *Robinson* v. *National Bank of New Berne* (4); *Moore* v. *Metropolitan National Bank* (5); *Cushman* v. *Thayer Manufacturing Company* (6); *Weaver* v. *Burdon* (7); *Merchants' Bank of Canada* v. *Livingston* (8); *Ballard* v. *Burgett* (9); *Covell* v. *Hill* (10); *Anderson* v. *Nicholas* (11); *Leitch* v. *Wells* (12).]

1887. May 25. CHITTY, J.:—

This action relates to 240 shares in the *New York Central Railroad Company*. The company is an American corporation constituted according to the law of the state of *New York*, and having its principal seat at *New York*. It has a register of shareholders at *New York*, and also, for the convenience of European transactions, a register in *London*. The only persons entitled to receive dividends and to vote are the shareholders whose names appear on the register. It is clear, then, that in order to assert a title as against all the world, or, in other words, to acquire a complete and perfect title to the shares, the name of the shareholder must be inscribed on the register. The company issue to the registered shareholders and to them alone certificates duly authenticated by the signatures of the president and treasurer. The name of the registered shareholder is written in before the certificate is issued by the company. The shares are not specifically numbered, but the certificates bear on the face of them definitive numbers. Each certificate is for ten shares. The certificate states that the person named is entitled to ten shares of the company's capital stock. It states also that the shares are

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(1) 46 N. Y. Rep. 325.
(2) 34 N. Y. Rep. 41.
(3) 20 Wend. 91; 22 Wend. 348.
(4) 95 N. Y. Rep. 637.
(5) 55 N. Y. Rep. 44.
(6) 76 N. Y. Rep. 365.
(7) 49 N. Y. Rep. 286.
(8) 74 N. Y Rep. 223.
(9) 40 N. Y. Rep. 314.
(10) 4 Denis, 323.
(11) 28 N. Y. Rep. 600.
(12) 48 N. Y. Rep. 613.

"transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate in the form and manner which may at the time be required by the transfer regulations of the company." For the transfer of shares a deed is not required; an instrument in writing is sufficient. This must be signed by the registered holder. On the back of the certificate there is a blank form of transfer of the stock or shares mentioned on the face of the certificate, and a blank form of power of attorney to execute a surrender and cancellation of the certificate, and to do all things requisite to transfer the stock on the books of the company. The transfer and power of attorney do not require a stamp.

The normal mode of transfer as appears from the documents themselves and the evidence is as follows: The transfer and power of attorney are signed by the registered shareholder whose name appears on the face of the certificate, and his signature is attested by a witness. The name of the transferee is filled in and the documents are taken to the office of the company; the certificates are surrendered and cancelled, and a new certificate is issued to the transferee whose name has been entered on the register. According to a practice which has extensively prevailed and has been recognised and acted upon by the company, the transferor signs the transfer and power of attorney without filling in the names of the transferee and attorney; and these blank transfers readily pass on the market from hand to hand by delivery only until the documents reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf. The documents are then left with the company, the certificates are cancelled, the transferee is registered, and new certificates in his name are issued in the manner already described.

The plain legal effect of this recognised practice is, that the transferor who executes the transfer in blank confers on the holder of the documents for the time being an authority to fill in the name of the transferee; and each successive holder for the time being, when the documents pass through several hands, passes on this authority. The holders must of course be *bonâ fide* holders for value without notice.

At the commencement of this action the Defendant was the registered holder of the shares in question, and certificates had been issued by the company certifying that he was entitled to the shares. Notwithstanding these facts the Plaintiffs contend that they have a legal title to the shares. For the Defendant it is contended that the Plaintiffs have no title to the shares, or if the Plaintiffs have any right to them it is only an equitable right, and that this equitable right cannot prevail against the Defendant, who had the first equitable right and has acquired the legal right for value in good faith and without notice of the Plaintiffs' claim.

The case arises out of the frauds committed by some member of the late firm of *Thomas, Son, & Co.*, brokers of the city of *London*. Mr. *Blakeway*, a member of that firm, absconded about the 30th of January, 1884, and presumably the frauds were committed by him. Mr. *Thomas*, another member of the firm, is still in *England*, and might have been called as a witness; but while neither side has imputed fraud to him, neither side has thought fit to run the risk of calling him or any person in the employ of the firm as a witness. On the facts so far as they are in dispute, each side has endeavoured to gain some advantage in the argument by reason of the omission of the other side to call Mr. *Thomas* or any one in the employment of the firm as a witness.

Having regard to the disputes as to some of the facts, it is necessary to state the facts as I find them.

The Defendant is a country clergyman, vicar of *Shepshed*, in *Leicestershire*. In August, 1883, he was desirous of investing a sum of between £5000 and £6000, and he applied to Messrs. *Thomas, Son, & Co.* for advice on the subject. They had for some years previously acted occasionally for him as brokers in similar matters. He had no reason to doubt their integrity. All the communications between him and them during the transaction in question were by letter or postcard only. On the 27th of August they informed him that pursuant to his instructions they had bought for him 230 shares in the *New York Central Railroad*, and asked him for his full name and address in order that they might register his name in the company's books. They enclosed the usual bought note shewing that they had bought for him on the *Stock Exchange* on the 27th of August 230 *New York Central Railroad* shares, at £119 per share, and that the purchase-money and commission amounted to £5502 15*s*. The bought note stated that the 30th of August was the settlement day. He duly forwarded to them the amount by cheque, which was cashed. They acknowledged the receipt by letter of the 29th of August, in which they stated that they would forward the share certificates when delivered to them, to *New York* for registration in his name.

On the 27th of August Messrs. *Thomas* bought 230 *New York Central* shares on the *Stock Exchange*, at £119 per share, of Messrs. *Medley & Co.*, jobbers, for delivery on the 13th of September. As is usual in such cases, the contract was by word of mouth, and the Defendant's name was not passed: the contract was checked or verified on the *Stock Exchange* on the following day in the usual manner. The transaction was completed between the jobbers and the brokers on the 13th of September. The purchase-money was paid or settled in account, and the jobbers delivered to the brokers certificates for 230 shares in the *New York Central Railroad*. The transfer and powers of attorney on the back of the certificates had been duly signed by the persons whose names appeared on the face of the certificates as entitled to the shares, and who were in fact the registered holders of the shares, but the blanks left for the names of the transferees and the attorneys were not filled in. For brevity, I will call these documents certificates with blank transfers. The documents were produced in Court and were identified by the jobbers' clerk as those which were delivered on the 13th of September; the identity was clearly made out by the definitive numbers on the face of the certificates. At the time of the completion a dividend amounting to £92 18*s*. had accrued on the shares, and the buyer was entitled to this dividend. On the settlement the jobbers paid or allowed in account to Messrs. *Thomas* the amount of this dividend. On the 28th of September the Defendant asked Messrs. *Thomas* when the dividends were due and how he was to obtain them, and on the 3rd of October they stated they had been unable to register his *New York Central* shares in time for this dividend, but had collected it of the sellers, and they enclosed a cheque for the amount, viz., £92 18*s*. In the same letter they stated that the books of the company would reopen on the 13th of that month, when they would at once proceed with registration of his shares, and that from thenceforward the dividends would be sent to him direct from the office of the company as they fell due.

In these circumstances it is contended for the Plaintiffs that the contract entered into on the 27th of August by the brokers Messrs. *Thomas* with the jobbers was not a contract entered into by the brokers as agents for the Defendant, but was an independent contract entered into by Messrs. *Thomas* to enable them to deliver the shares to the Defendant, and the argument was pushed so far as to contend that Messrs. *Thomas* were sellers of 230 shares to the Defendant. This contention is founded solely on the slight discrepancy as to the date of completion. Having regard to the other facts proved, I hold this discrepancy to be immaterial. The only contract shewn by the evidence to have been entered into by Messrs. *Thomas* on the 27th of August for *New York Central* shares was the contract with *Medley & Co.* It was said for the Plaintiffs that some other contract may have been entered into; but no one was called to prove that there was any other contract, and there is no ground for drawing any inference that there was. The contract with *Medley & Co.* tallies as to price and the number of shares, and in all other respects save the date of completion with the bought note sent to the Defendant. The discrepancy is fairly attributable to some error, at all events it is but a slight discrepancy, and it is a circumstance of no weight as against the other facts, including the correspondence down to the 1st of October and the payment of the £92 18*s*. in respect of the dividend.

The result then thus far is this: that on the delivery to Messrs. *Thomas* of the certificates with blank transfers for 230 shares the property in those documents and all the rights which attached to them or passed under them vested in the Defendant, and that the documents were left or permitted by him to remain in the hands of Messrs. *Thomas* as his brokers, and solely for the purpose of their procuring the shares to be registered in his name. It was proved by one of the Plaintiffs' witnesses that it was the duty

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of the broker when such shares were bought for investment to see to the transfer, and that the broker's commission covered the registration of the shares and the obtaining of new certificates.

Subsequently, on the 4th of October, 1883, Messrs. *Thomas* bought ten more shares for the Defendant. This transaction was duly completed on the 12th of October. It was similar in all respects to the transaction as to the 230 shares, except that it is free from the question as to the discrepancy of date. The certificate with blank transfer for the ten shares was delivered to Messrs. *Thomas* on the 12th of October, who had previously received the purchase-money and commission from the Defendant. The documents remained in Messrs. *Thomas*' hands solely for the purpose of their procuring the shares to be registered in the Defendant's name.

In January, 1884, the Defendant applied to Messrs. *Thomas* for information in regard to his shares, and was informed by them in reply that his shares were still in course of registration, but that the books of the company being closed for dividends the certificates had not yet been issued. Messrs. *Thomas*, in the same letter, told him that the dividend would be sent to him direct by the company when it fell due, which would not be till the 15th of January. On that day the Defendant received the January dividend on the 240 shares from Messrs. *J. S. Morgan & Co.*, the agents of the company in *England*. The cheque was accompanied by a letter stating that it was for the dividend on 240 shares standing in his name in the books of the company.

It was not contended for the Plaintiffs, and it could not have been successfully contended, that the Defendant was guilty of any negligence in leaving the documents in the hands of Messrs. *Thomas* for registration of the shares.

I now proceed to state the facts on which the Plaintiffs found their claim to the shares.

On the 29th of November, 1883, Messrs. *Thomas* borrowed from the Plaintiffs, the *Colonial Bank*, £50,000, and pursuant to the contract for the loan, they deposited later on the same day certificates with blank transfers of 230 *New York Central* shares, and other securities. It is immaterial, in the conclusion I have arrived at, to consider whether those securities were deposited as

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security merely for the £50,000 loan, or for the floating balance of Messrs. *Thomas*' loan from the bank, which amounted with the £50,000 to £220,000. The Plaintiffs' securities clerks, Mr. *White* and Mr. *Proctor*, who were called as witnesses, were unable to identify the particular certificates deposited. The bank-books contain no entries identifying the certificates by the definitive numbers or other description, and there was no direct evidence that the certificates deposited were the certificates of the Defendant's shares. But I think that the reasonable and proper inference to be drawn from the facts proved is, that the batch of certificates deposited with the Plaintiffs was the batch of certificates for 230 shares delivered to Messrs. *Thomas* on the 13th of September. On the 11th of December following the bank redelivered to Messrs. *Thomas* the certificates of the 230 shares. This was done pursuant to a request in writing made to the bank by Messrs. *Thomas*, in which they stated that they were desirous of sending them "in for registration before the books closed" on the next day, and that they would hand to the bank the receipt that afternoon. In their statement of claim the Plaintiffs alleged that this delivery was made for the purpose of having the shares registered in their own names. But the evidence adduced on the part of the Plaintiffs did not prove this allegation. The evidence of their securities clerks, who were the only witnesses on the subject, went to prove that they understood that the shares were to be registered in the names of Messrs. *Thomas*. I hold as a fact that the clerks had no clear view on the subject, but that the Plaintiffs when they thus parted with the certificates did not intend that the registration should be otherwise than for their benefit. This, I think, was the meaning conveyed, and intended by Messrs. *Thomas* to be conveyed, by their written request. On the same 11th of December Messrs. *Thomas* filled in the name and address of the Defendant in the blank transfers for 240 shares. The certificates with blank transfers of these shares are clearly identified by the evidence as being the certificates with blank transfers of the 240 shares bought by them for the Defendant. On the same day Messrs. *Thomas* also filled in a form of surrender of the same certificates, giving the name and address of the Defendant as the name and address of the person in whose name the

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shares were to be registered. They handed in these certificates and the transfers and surrender then filled in to Messrs. *J. S. Morgan & Co.*, the fiscal agents of the railroad company in *England* for registration in the Defendant's name. The fiscal agents in the usual course of business passed these documents to the *London* registrar of the railroad company by whom the certificates were cancelled. The cancelled certificates were transmitted by the *London* registrar to *New York*. The 240 shares were duly registered in the Defendant's name on or as on the 11th of December in the register in *London*, and subsequently in the *New York* register. The new certificates for the same shares were made out in the Defendant's name, and were ready for issue on the 20th of December. The blank transfers on the back of these new certificates were never signed by the Defendant.

On the 11th of December, Messrs. *Thomas* when they handed in the certificates and surrender to Messrs. *J. S. Morgan & Co.* received from them a ticket or receipt for the surrender, on which receipt there was a number referring to the surrender, and a statement to the effect that the new certificates would be ready on the 20th of December. This ticket or receipt Messrs. *Thomas* delivered on the 11th of December to the Plaintiffs with a memorandum stating that they begged to hand a receipt for 240 *New York Central* shares sent in for registration. The Plaintiffs kept this ticket until the beginning of February, 1884. At the end of January or beginning of February, 1884, they learnt that *Blakeway* had absconded, and they sent a clerk (who has since died) to the office of Messrs. *J. S, Morgan & Co.* with the ticket to obtain the new certificates. As the clerk was apparently a respectable person coming from a well-known bank, and produced the ticket, Messrs. *J. S. Morgan & Co.* delivered the new certificates to him without inquiring whether he came for them on behalf of the Defendant, whose name, as already stated, appeared on the certificates. These new certificates have ever since remained in the possession of the Plaintiffs. As a matter of fact, I hold on the evidence that Messrs. *Morgan & Co.* handed the certificates to the Plaintiffs' clerk in the erroneous belief that he was authorized to obtain delivery of them on behalf of the Defendant.

On these facts the claim of the Plaintiffs to ten of the shares in question clearly fails. They never had in their possession certificates for ten of the 240 shares. For the Defendant it was contended that the Plaintiffs' claim must entirely fail because they had not proved what particular certificates came into their possession. But as already stated, I think the right conclusion of fact is that the Plaintiffs had possession from the 29th of November to the 11th of December of the twenty-three certificates delivered to Messrs. *Thomas* on the 13th of September. The result then thus far is that the Plaintiffs' claim fails as to the ten shares bought for the Defendant in October.

The question of the Plaintiffs' claim to the 230 shares remains for consideration.

The Plaintiffs adduced evidence for the purpose of shewing a general mercantile custom first in the State of *New York* (the domicil of the railway company) that the shares passed by delivery of the certificates with blank transfers from hand to hand as negotiable instruments; and, secondly, a similar custom in the city of *London*, where the transactions in question took place. Having regard to the mode in which the Plaintiffs' counsel ultimately shaped their argument, it is unnecessary to say more on this evidence than that it did not prove any such general custom: and for a similar reason it is unnecessary to consider whether any legal effect could have been given to any such customs if proved. The Plaintiffs also adduced evidence to shew what legal effect was attributed by the law of the State of *New York* to the delivery from hand to hand of the certificates with blank transfers.

The ultimate shape in which the Plaintiffs' counsel put their argument was this: They did not contend, and indeed they could not have successfully contended, that the certificates with blank transfers were negotiable instruments in the strict sense of the term; but they urged that these documents were what they termed negotiable by estoppel. They contended that the effect of the mere delivery of the document to a *bonâ fide* purchaser operated as a legal as well as equitable transfer of the shares whatever might be the defect in the title of the vendor, and that every prior holder was estopped from denying the title of such *bonâ fide* purchaser. They founded this argument on the first proposition relied on by Lord *Cairns* in *Goodwin* v. *Robarts* (1).

Now, assuming this argument to be correct, and assuming as a matter of fact that the Plaintiffs were purchasers for value without notice, the Plaintiffs acquired a legal and equitable title to 230 shares on the deposit of the certificates with them in November, notwithstanding the fraud committed by Messrs. *Thomas* on the Defendant. The Defendant thus loses his title to the shares simply by reason of his having left the certificates in his broker's custody, having in this manner, and in this manner only, put it in the power of Messrs. *Thomas* to dispose of his shares. But when the Plaintiffs re-delivered the certificates to Messrs. *Thomas* they equally put it into their power to make a fraudulent disposition of the shares which are assumed to have been theirs at the time of such re-delivery, and Messrs. *Thomas* in turn made a fraudulent disposition of the shares as against the Plaintiffs by dealing with the documents in the manner already described for the benefit of the Defendant. Why is not the Defendant in turn a purchaser for value of the shares without notice? It is said that he is not, because he was thus taking through the fraud of his own agents, Messrs. *Thomas*. But when they obtained delivery of the certificates from the bank they did not purport to act, nor were they in fact acting, as agents for the Defendant. According to the Plaintiffs' witnesses, Messrs. *Thomas* asked for the certificates in order to register the shares in their (Messrs. *Thomas*') own names. The Defendant was wholly ignorant of the fraud which had been committed on himself and of the fraud committed on the Plaintiffs. Messrs. *Thomas* were under an obligation to cause these particular shares to be registered in his name. They filled in his name as transferee, surrendered the certificates, and caused his name to be registered. If they had sold the shares to him or deposited them with him for an advance or as security for an existing debt, it is admitted that he would have acquired a complete title. It was not necessary that he should go to Messrs. *Thomas*' office and demand performance of their obligation to procure the shares to be registered in his name. In the correspondence he was pressing them to register the shares in his name. It

(1) 1 App. Cas. 476.

was this pressure and the fear of the fraud being discovered which induced Messrs. *Thomas* to obtain the re-delivery of the certificates. The performance of the obligation which Messrs. *Thomas* were under towards him was a valuable consideration for the transfer and registration which they in fact made, and he has in fact accepted. It appears to me that he stands in reference to the Plaintiffs in as good a position as he would have been in if he had bought the shares of them and paid for them and the certificates had been handed to him on the 11th of December.

But I think that this case does not fall within the principle of estoppel on which Lord *Cairns* acted in *Goodwin* v. *Robarts* (1). In that case the instrument in question was simply scrip purporting on the face of it that the bearer would be entitled to receive the definitive bond from the foreign government in exchange for the scrip. The scrip, as Lord *Cairns* stated, virtually represented that the paper would pass from hand to hand by delivery only, and that any one who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms by the foreign government. Each prior holder was deemed to have concurred in that representation in favour of the ultimate holder in good faith and for value. The certificates with blank transfers do not contain any such representation. On the contrary, they contemplate transfer by getting in the name of the transferee and by registration on the books of the company. Adopting the language of Earl *Selborne* in *Société Générale de Paris* v. *Walker* (2) to these certificates, there is on the face of them an engagement that the shares thereby represented are transferable only on the surrender and cancellation of the certificate; and the printed form on the back (which is issued by the company) shews that a complete transfer is a transfer on the books of the company, that is, by registration. Estoppels cannot be manufactured arbitrarily; no estoppel can be raised on a document inconsistent with the terms of the document itself. What, then, is the estoppel here? Having regard to the practice proved and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me)

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(1) 1 App. Cas. 476.

(2) 11 App. Cas. 29.

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the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee and is estopped from denying such authority; and to this extent, and in this manner, but not further, is estopped from denying the title of such holder for the time being. By the delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to what has been termed "the legal estate" in the shares or to the complete dominion over them. Had the Plaintiffs filled in their own names or the name of some nominee of their own in the blank transfers while in their possession, the case would have stood differently; the Defendant would not have been registered as the holder of the shares. As it is, the Plaintiffs never had a present absolute unconditional right to register. Their inchoate title was liable to be defeated, and has been defeated by the Defendant acquiring in good faith for value a complete legal title by transfer filled in with his name as transferee and by registration.

On cross-examination the Plaintiffs' witnesses gave evidence to the effect that when Messrs. *Thomas* made the deposit with the bank the officers of the bank did not suppose that Messrs. *Thomas* were dealing only with securities belonging to themselves. It is unnecessary to express any opinion on the question, which the Plaintiffs say is covered by the recent decision of the Court of Appeal in *Easton* v. *London Joint Stock Bank* (1), whether, having regard to the evidence, the Plaintiffs are *bonâ fide* purchasers without notice.

As to the counter-claim, the Defendant is entitled to have the new certificates delivered to him. He is the legal owner of the shares, the certificates are in his name, and they were delivered to the bank's clerk in error.

I therefore dismiss the action with costs, and give judgment for the Defendant on his counter-claim with costs.

Solicitors: *Druces & Attlee; Dod, Longstaffe, Son, & Fenwick.*

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(1) 34 Ch. D. 95.

G. M.

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April 5, 27; *May* 9.

[1886 U. 156.]

Customs Annuity and Benevolent Fund—Nature of Interest of Subscriber—"Nominee"—Nomination as Trustee—Jurisdiction of Court of Lunacy to nominate on behalf of Lunatic Subscriber—56 *Geo.* 3, *c. lxxiii.*, *s.* 9.

On the construction of the Act 56 Geo. 3, c. lxxiii., by which the *Customs Annuity and Benevolent Fund* was established, and of the rules made under the authority of that Act:—

Held, that the interest of a subscriber to the fund in an insurance effected upon his own life is not of the nature of property, but that he has only a limited power of appointment among the objects defined by the rules, *i.e.*, his wife, children, and other relatives, and his "nominees" as prescribed by the rules:

Held, therefore, that the Court of Lunacy has no jurisdiction to appoint a "nominee" on behalf of a lunatic subscriber:

Held, also, that a "nominee" must be a person who is to take a beneficial interest in the fund, and that there cannot be a nomination of a person who is to take as a trustee for others.

Decision of *Malins*, V.C., in *In re Pocock's Policy* (1) disapproved.

THIS action was brought to enforce payment by the directors of the *Customs Annuity and Benevolent Fund* of the amount of an insurance effected with the fund by *Lewis Robert Hoyes*, who died on the 26th of March, 1885. The fund was established by the Act 56 Geo. 3, c. lxxiii., and the Plaintiff alleged that he was the "nominee" of *Hoyes* admitted by the directors pursuant to the Act and to the rules made under it. The Defendant was the secretary to the fund, in whose name, by virtue of sect. 12 of the Act, the directors were to sue and to be sued.

The Act was entitled "An Act for establishing and regulating a fund for the widows, children, and relatives of officers or persons belonging to the Department of Customs in *England*."

Sect. 1 contained provisions for the appointment of a committee to make rules for regulating the fund, and for appointing directors and other officers; and by sect. 2, the rules, when approved by the Commissioners of the Customs, and ratified by a judge of one of the Superior Courts of Common Law, were to have the same force and effect as if they had been enacted in the Act.

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(1) Law Rep. 6 Ch. 445.

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Sect. 4 provided that a poundage in aid of the general purposes of the fund should be levied on the salaries of all persons engaged in the Customs Department, with a power for any persons so engaged to give notice that they objected to it, in which case they were excused from paying it, but became incapable of becoming subscribers to the fund.

By sect. 9 "the said directors shall and may, if they shall deem it expedient, admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative or relatives of the said subscriber; and the said nominee or nominees so admitted as aforesaid shall, and are hereby declared to, have, and thereafter to continue to have, to all intents and purposes, the same and the like interest in the said fund, and in the advantages thereof, as if the said nominee or nominees had been a relative or relatives of the said subscriber, under and subject in every respect to the rules and regulations approved and ratified as aforesaid."

Sect. 13 provided that, if any subscriber to the fund should cease to belong to the department, provided that he should continue to pay the poundage payable at the time of his ceasing to belong to the department under the rules, should retain his interest in the fund, and continue to be a subscriber to it; and his widow, children, and other immediate relatives, as the case might be, should enjoy all such benefit therefrom as fully as if he had continued to belong to the department.

Sect. 16 provided that the directors should have the full, entire, and exclusive control and management of and over the fund, and empowered them from time to time to alter the rules and to make new and additional rules, but no alteration or new rule was to be valid until it had been approved by the subscribers and the Commissioners, and ratified by a Judge.

The fund was raised by voluntary subscriptions on the principle of life insurance, which subscriptions, together with the poundage, formed a fund for the widows, children, relations, and nominees, of persons employed in the Customs. Rules were from time to time made, approved, and ratified, in the manner provided by the Act.

The first rules were made on the 26th of June, 1819.

By rule 25: "The capital sum of money insured by any subscriber, together with the additions of profit which may from time to time be made thereto, shall, in its disposal at his death, be subject to the following regulations, namely:—For every £10 of annuity to his widow insured under table (A), £100 of capital money insured under table (B) shall be available, in such manner or proportions as he may think proper and direct in his will for the benefit of his widow, children, or relatives; and also, under the admission of the directors, in like manner or proportions, for the benefit of his nominee or nominees, who may not be a relative or relatives of such subscriber; and, if no annuity to his widow shall be insured, then one-half of any such capital money shall be appropriated to the use of his widow, by allowing her an annuity upon the terms of table (C); and the other half of such capital money shall be available for the purposes of his will as aforesaid. And, in the event of a subscriber dying without leaving a widow, the whole of the capital money shall be so available for the purposes of his will. And in all cases where subscribers die intestate, the capital money which may be available shall be applied to the exclusive use of the child, or in equal proportions to the exclusive use of the children, of such subscribers, in the same manner as any other property would be applied by law. And, if such deceased subscriber shall leave no child or children, then such available capital money shall be applied in manner set forth in the *Statute of Distributions*. And in all cases where the capital money forthcoming to any subscriber under table (B) shall exceed the amount of the annuity under table (A), insured by him for his widow (an annuity of £10 and a capital sum of £100 being deemed equivalent), one-half of the surplus capital money shall be appropriated to the use of his widow, by allowing her a further annuity upon the terms of table (C): Provided that, in every case where a subscriber may agree or direct that the interest which may arise from the whole of the capital money forthcoming shall at his death, according to the then price of the Government funds, be appropriated to the exclusive benefit of his widow during her life, such capital money shall not be subject to the regulations hereinbefore made, but shall be reserved for the benefit of such widow in manner aforesaid, and be available at her death for the purposes of the will of such subscriber as aforesaid. And, in every case where a provision for life is absolutely and in law secured to any widow from any other source whatsoever, £100 of any capital money forthcoming from the fund shall be set off as an equivalent to every £10 of income so secured, and shall be available for the purposes of the will of the subscriber as aforesaid, but the capital money that may be forthcoming over and above the proportion so set off shall be subject to all the regulations before stated, in like manner as if no such provision had been secured to such widow."

On the 22nd of December, 1827, new rules were made by which the rules of June, 1819, were repealed and the new rules substituted for them, but it was provided that nothing in the new rules should extend "to alter the terms of any insurance already made by any subscriber, so far as relates to the rates of his subscription, or to any option allowed him in respect of the application of the capital sum insured, or of the profits thereon which may be apportioned to him.

Rule 1 provided that the fund "shall be raised by subscription upon the principle of life insurance, in addition to the contribution of poundage, authorized and granted by the Act aforesaid: and the widows of subscribers shall in all cases participate (in the form of a life annuity) to the extent of one-half, at the least, in the insurance effected; unless for misconduct in the woman the directors shall, at the instance of the subscriber, see cause to allow a different disposition: and the admission by the directors of a nominee or nominees of a subscriber under the said Act, shall, as to the person of such nominee or nominees, take place during the life of the subscriber."

By rule 23: "The capital sum of money insured by a subscriber, together with the addition of profit which may have been made thereto, shall, in its disposal at his death, be subject to the following regulations, viz., for every £10 of annuity to his widow insured under table (A), £100 of capital money insured under table (B) shall be available in such manner and proportion as he may direct by any deed or instrument, or by his will, for the benefit of his widow, children and relatives, and for such nominees who shall have been duly admitted by the directors; and, if no annuity to his widow shall be insured under table (A), then one-half of the whole of such capital money shall be appropriated to the use of his widow, by allowing her an equivalent annuity under table (C), except where it shall have been otherwise ordered on account of misconduct as aforesaid, and the other half of such capital money shall be available as aforesaid; and, in the event of a subscriber dying without leaving a widow, the whole of the capital money shall be so available; and where a subscriber dies intestate, and shall not have applied such available capital money by any deed or instrument for the benefit of his widow, children, relatives or nominees, the whole of such available capital money due at his decease by virtue of his insurance shall become the property of his child or children in equal proportions, and in the event of his leaving no child or children, then the same shall be appropriated to the use of his widow, by allowing her an equivalent annuity under table (C) in addition to the annuity before apportioned to her; and if such subscriber shall leave no widow, nor any child or children, the whole capital money due shall be applied according to the *Statute of Distributions*. And in all cases where the capital money due under table (B) shall exceed the amount of the annuity due under table (A) (an annuity of £10 and a capital sum of £100 being deemed equivalent), one-half of the surplus capital money shall be appropriated to the use of the widow by allowing her a further annuity under table (C), except as aforesaid. But, if an annuity to any widow shall have been insured under table (A), and the directors shall have seen cause to allow of a different disposition of such annuity on the ground of misconduct as aforesaid, it shall be competent for the directors to convert such insurance of an annuity into an equivalent insurance of a capital sum according to the amount of the premium for such annuity."

On the 28th of July, 1836, new rules were again made, by which all the rules then in force were repealed and the new rules were substituted, but there was a proviso "that nothing herein contained shall extend to alter the terms of any insurance already made and now paid by any subscriber, so far as relates to the rates of his subscription, or to any option allowed him, in respect of the application of the capital sum insured, or of the profits on

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any insurance made by him. Nevertheless, any such insurance may, if the subscriber should direct, be disposed of as hereinafter allowed."

The principal alteration made by these rules which is material for the present purpose was (rule 12) that the direction of the subscriber as to the application of the capital insured was to be given "by any instrument in writing, signed in the presence of one or more witness or witnesses, and deposited with the directors, or by his will."

Several notes (not forming part of the rules) were appended to them.

Note D was as follows:—"If the subscriber shall apply his insurance by will, it is necessary that he should make specific mention of his insurance in the *Customs Fund*; otherwise he will be deemed to have died without having given directions as to that insurance, for it will not pass under any general terms. In fact, the insurer himself has no actual property whatever in the sum insured, he has only the power to appoint the same for the benefit of the parties described in the rules."

Other rules were made subsequently, but as they were not referred to in the judgment of the Court, it is considered unnecessary to state their provisions. The rules of 1872 are stated in the report of *In re William Phillips' Insurance* (1).

Lewis Robert Hoyes was born in the *East Indies* in 1806. He was an illegitimate child. His father was a native of *Scotland.* In 1813 his father sent him to *Forres,* in *Scotland,* to be educated. In 1824 he entered the service of the Customs Department in *England.* In April and July, 1827, he effected two insurances on his life with the *Customs Fund,* for sums amounting together to £2000. In 1834 he went back to *Forres,* and in 1835 he became insane and was placed in a lunatic asylum at *Aberdeen,* and was shortly afterwards found to be a lunatic, and on the 28th of November, 1835, *John Forsyth* was appointed by the Court of Session to be his *curator bonis.* In 1838, the lunatic, being incapable of fulfilling his duties, was discharged from the service of the Customs Department. He remained of unsound mind until his death, and he was never married.

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(1) 23 Ch. D. 235.

On the 24th of March, 1840, the following circular letter was addressed by the secretary of the *Customs Fund* to the subscribers, a copy of it being sent to *Hoyes* :—

"I am commanded by the directors of the *Customs Fund* to acquaint you that in the apportionment of the profits of the fund realized up to the 5th day of January last, your insurances stand as mentioned on the back hereof. I am also commanded to take the opportunity which this circular affords to draw your particular attention to the 12th rule (of the rules dated the 28th of July, 1836), and to acquaint you that if you give directions by will as to the manner in which the 'capital sum' insured by you is to be appropriated at your death, you must make specific mention of your insurance in the *Customs Fund*, otherwise you will be deemed to have given no directions disposing of that insurance, for it will not pass under any general terms. If you have already made a will, it would be well for you to refer to it, and satisfy yourself that it is properly worded in this respect, and if you have not already given due directions disposing of your insurance, the directors recommend you at once to do so, for an informality or omission herein might be an injury to the party for whom alone you are desirous of making provision, and thus frustrate the whole object of your insurance.

"There are forms printed at the foot of the said 12th rule to assist subscribers in disposing of their insurances at their death, and these forms may be used either in a will or as a separate instrument, as is provided in that rule; in the latter case however there will be no need of any administration at your death, for the directors are empowered to pay the insurance at once under the authority of such an instrument alone.

"I am further to acquaint you that the word '*relatives*' used in the rules and in the Fund Act of Parliament only includes relations by blood, and not sons-in-law or daughters-in-law. If, therefore, you have disposed of your insurance to a son-in-law or to a daughter-in-law, or to any other party who is not a relation by blood, the directors must at your instance during your lifetime admit them your nominees, to entitle them to receive at your death the sum you may have so set apart for their benefit, and it is necessary, therefore, that you should make application to the directors for that purpose."

This letter was received by *Forsyth* as *curator*. On his appointment as *curator* he had found among the lunatic's papers a sealed packet, which was indorsed "to be opened after my death," and also a copy of a will. Under the authority of the Court the sealed packet was opened, and it was found to contain a will (in the same terms as the other document) executed by the lunatic, and dated the 10th of August, 1833. By this will the testator, after bequeathing some legacies, gave all the residue of his estate and effects "unto my uncle *Lewis Hoyes*, of the *Island of Grenada*, and his heirs," and appointed him and two other persons his executors. The will contained no specific reference to the testator's insurance in the *Customs Fund*. *Forsyth* thereupon entered into communication with the directors of the *Customs Fund*, and informed them of his own position and of the contents of the will. The premiums had been kept up out of the income of the lunatic. The directors of the fund replied to the effect that they could not admit either *Forsyth*, the executors named in the will, or the legatees, as the "nominees" of the lunatic, but that they would advise every facility to be given for the admission and acceptance of such nominee as should be sanctioned or appointed by a competent Court. *Forsyth* thereupon presented a petition to the Court of Session asking the Court to nominate him as "nominee" of the lunatic, for behoof of the legatees under the will, to his interest as a subscriber to the fund in terms of the statute and regulations, or to appoint the legatees themselves as nominees, or to authorize the petitioner to surrender the policies. On the 13th of July, 1841, the Court made an order on this petition, nominating *Forsyth* "nominee of *L. R. Hoyes*, for behoof of the legatees under that gentleman's will, appended to this petition, to his interest as a subscriber to the *Customs Annuity and Benevolent Fund* in terms of the statute and regulations, and direct the petitioner to communicate the said appointment to the directors for their acceptance and admission as parties interested in the fund in terms of the statute and regulations."

On the 4th of August, 1841 Mr. *Gellatly*, a solicitor in *London*, who was acting for *Forsyth*, wrote to the directors of the fund, sending them a copy of the petition and a copy of the order made thereon, and asking them to notify to him "that you have accepted and admitted the said *John Forsyth* as nominee as aforesaid." On the 15th of September, 1841, the secretary of the fund wrote to *Gellatly* that "the directors are advised that there is not at present sufficient authority for them to act in this case." A case was afterwards submitted by *Forsyth's* solicitor for the opinion of Mr. *Ryder Dean*, who was one of the standing counsel to the directors of the fund. Mr. *Pocock*, the solicitor to the directors, was aware of this case being sent, though it was not a joint case. On the 27th of April, 1842, Mr. *Ryder Dean* gave the following opinion:—"The question is whether the application now made to them (the directors) can be regarded as a sufficient authority on the part of Mr. *Hoyes* to render it safe for them to act upon it, and I think (assuming that the jurisdiction and powers of the Court of Session over lunatics in *Scotland* are similar to those exercised by the Lord Chancellor over lunatics in *England*, and if any doubt is entertained on this subject the directors might perhaps require the opinion of a Scotch lawyer to be taken for their satisfaction) that it may. The Lord Chancellor sitting in Lunacy is constantly in the habit of authorizing committees to do certain acts for the preservation or improvement of the property of lunatics, such as the Court thinks it would have been wise and prudent in the lunatics themselves to do in case they had been capable. Whether he would have made a similar order to that pronounced by the Court of Session in the present case, it is of course impossible to say, nor, I think, is it at all material: the care of the person and property of the lunatic is vested in the Court of Session, and that Court, having, as I conceive, competent jurisdiction so to do, has authorized an act to be done on behalf of the lunatic which is clearly beneficial to his estate, but which he is unfortunately incapacitated from performing himself. Under the circumstances I am of opinion that Mr. *Forsyth* has satisfied the regulations of the fund, and that the directors would be justified in admitting him as the nominee of Mr. *Hoyes* with reference to the insurance in the fund; at the same time such admission would be purely in the discretion of the directors, there is no power to enforce their compliance, and, in the event of their refusal, I am not aware of any other steps that could be taken in the lifetime of Mr. *Hoyes* for securing the benefit of the insurance, and upon his death without such nominee having been admitted I am afraid that from his peculiar situation the amount of his insurance would either become absolutely forfeited or would vest in the Crown.

"Supposing, however, that the directors should agree to admit Mr. *Forsyth*, I apprehend that, upon the death of Mr. *Hoyes* in his present condition, without leaving any widow or child, that gentleman would under the regulations of the fund become absolutely entitled to receive the amount of the insurance, and that his receipt would effectually discharge the directors from all liability to see to its application. He would of course have to account for the moneys received in the Court of Session, by which he was nominated as a trustee for the parties entitled under Mr. *Hoyes*' will, and would be required to pay over the amount to the executors to be distributed accordingly, but with that distribution the directors would have no concern. All they would have to ascertain would be, that Mr. *Hoyes* had died without leaving a widow or child (he could, of course, from the circumstance of his birth, have no relation by blood), and his nominee would then, under the 9th section of the Act, be entitled to the same interest in the fund as if he had been his relative, and I do not see by whom the payment by the directors to such nominee could be called in question."

On the 28th of April, 1842, Mr. *Gellatly* wrote to the directors, sending them the case laid before Mr. *Ryder Dean*, with a copy of his opinion, and stating that Mr. *Knight Bruce* had also given an opinion, in which he said, "My impression is that the directors may and ought to allow" the acceptance of *Forsyth* as nominee.

On the 5th of May, 1842, Mr. *Plank*, the secretary to the fund, and Mr. *Strickland*, the comptroller, wrote a letter to Mr. *Gellatly* in which, after referring to the previous correspondence, the proceedings in *Scotland*, and the opinion of Mr. *Ryder Dean*, they said: "We are commanded by the directors of the fund to acquaint you that under these circumstances they have admitted the said

John Forsyth nominee of the said *Lewis Robert Hoyes*, in the terms of the said order of the Lords of Council and Session dated the 13th of July, 1841."

From that time forward *Forsyth* paid the premiums on the policies down to the year 1849, when by the terms of the policies no further premiums were payable.

On the 1st of June, 1853, an order was made by the Court of Session recalling the appointment of *Forsyth* as *curator* to the lunatic, and appointing *Robert Urquhart*, the Plaintiff in the present action, to be *curator* in his place. On the 30th of December, 1853, *Urquhart* wrote to the secretary of the fund informing him of his appointment as *curator*, and on the 4th of January, 1855, *Urquhart* was admitted by the directors as nominee in the place of *Forsyth*.

After the death of the lunatic his will of the 10th of August, 1833, was admitted to probate in *Scotland*.

At the time of his death the sum payable in respect of the policies amounted to £5864.

By his statement of claim the Plaintiff claimed a declaration that he, as nominee of *Hoyes* admitted by the directors, was entitled to payment of the £5864, with interest, out of the fund, and that he was entitled to give a good discharge for the same, and an order that the same might be paid to him out of the fund accordingly; or that, if he should be held not entitled to the insurance, the premiums which *Hoyes* and his *curator* had from time to time paid might be ordered to be repaid to the Plaintiff with interest.

Giffard, Q.C., and *R. Campbell*, for the Plaintiff:—

Under the Act the subscriber has a right to appoint a "nominee," and, when he is accepted by the directors, the "nominee" stands in the place of the subscriber. The order of the Court of Session is an effectual appointment of the Plaintiff as "nominee," on trust for the persons mentioned as legatees in the particular will referred to in the order.

[*Cozens-Hardy*, Q.C., for the Defendant:—I admit that the nomination by the Court is as effectual as it would have been if made by the subscriber himself (being sane) in his lifetime, and the nominee had been admitted by the directors. But I do not admit that the subscriber himself could appoint a "nominee" as trustee for other persons.]

The question is one between the Plaintiff and the directors of the fund, who are his trustees; no *jus tertii* is set up. The Plaintiff having been admitted by the directors as a "nominee," he can give a good discharge for the money, and they are bound to pay it to him, though he, when he gets the money, may be accountable for it as a trustee for other persons. With that the directors have nothing to do, and the Court will not now look beyond the person who can give a legal discharge: *In re Maclean's Trusts* (1); *In re Pocock's Policy* (2). It may be said that in some cases the Court has held that the interest of the subscriber in the fund is not in the nature of property, but that he has only a limited power of appointment among a particular class of objects. In all those cases, however, no "nominee" had been appointed by the subscriber. The Court would not allow the title of a nominee to be defeated by a mere irregularity of form. But there has been no irregularity in the present case.

At any rate, after what took place at the time when *Forsyth* was admitted, the directors are estopped from saying that he, and after him the Plaintiff, were not validly admitted as nominees. *Forsyth* acted on the faith of representations made by the directors which they are bound to make good. The position of the lunatic's estate was altered by the course which the directors induced the *curator* to take; he might otherwise have surrendered the policies, instead of keeping up the premiums out of the estate. There was, in truth, a new contract entered into between the *curator* and the directors, on the footing of which he paid the subsequent premiums.

If the Plaintiff is not entitled to the proceeds of the insurance, at any rate he is entitled to have the premiums which were paid after 1842 repaid, for there has been a failure of consideration, and they were paid under a mistake of fact.

Cozens-Hardy, Q.C., and *G. Henderson*, for the Defendant:—

The Plaintiff's case has been argued on the theory that the subscriber has a property in the sum insured. But there is a series of decisions shewing that the subscriber has no property, and that he has only a limited power of appointment among a class consisting of his wife, his children, his relatives, and his "nominees" duly admitted according to the rules. In *Attorney-General* v. *Rowsell* (1), decided by the Court of Exchequer in

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(1) Law Rep. 19 Eq. 274.

(2) Law Rep. 6 Ch. 445.

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(1) Court of Exchequer,
May 6, 1844.

ATTORNEY-GENERAL *v.* ROWSELL.

THIS was a motion to make absolute a rule which had been obtained on behalf of the Attorney-General, calling on *E. Rowsell*, to whom as executor of his deceased brother probate of the brother's will had been granted, to shew why he should not account for legacy duty in respect of the proceeds of an insurance effected by the testator on his life in the *Customs Annuity and Benevolent Fund*, which proceeds he had disposed of by his will.

Erle, *Rogers*, and *Deane*, for the executor, shewed cause.

Twiss, and *Crompton*, for the Attorney-General.

POLLOCK, C.B.:—

I am of opinion that this fund is not liable to legacy duty, and I am quite willing to treat the case upon the principle proposed by Mr. *Twiss* in his argument. Assuming this to be merely an ordinary case of insurance, it lies between the case of an insurance of a sum of money to be paid to a particular person, a widow or a child, and that of an insurance of a sum to be paid to the executor of the assured, and entirely under his control. Here it appears that the subscriber had one brother, and having no wife and no children, the amount of the insurance is given by his will to that brother. I think this case is not within the definition of a "legacy" given in sect. 7 of 36 Geo. 3, c. 52, that is, a gift by will which shall have effect out of the personal estate of the testator, or out of any personal estate which he shall have power to dispose of as he shall think fit. Now I do not think this was personal estate of the present testator. The money arises from a subscription to a fund for particular purposes, over which the subscriber has in some instances no control at all, and, in any case in which he has a control, it is only a limited control. If he appoints a nominee the nominee can only be admitted "if the directors shall deem it expedient," and I cannot help thinking that the Act was passed, and the rules were framed, to accomplish the humane, charitable, and beneficial object of securing a fund for the benefit of the widows and children of officers of the Customs and other persons for whom they might be bound to provide, and especially to exclude the possibility of its becoming anything like a general insurance office for the officers. Viewing it in that light (and it appears to me that that is the true light in which it should be viewed), I think that this money cannot be considered as part of the testator's personal estate, and he could not dispose of it as he pleased. I think it could not have been made available for the payment of his debts; if he had become bankrupt or insolvent during his life it could not have been attached. It seems to me that the fund has been placed out of his dis-

1844, it was held that legacy duty was not payable in respect of the proceeds of an insurance in this fund, on the ground that the sum insured was not the property of the subscriber, and that he could not dispose of it in any way he pleased, but that he had only a limited power of appointment among a particular class of objects. In *Attorney-General* v. *Abdy* (1) it was held that the proceeds of an insurance in the fund were liable to succession duty, but the Court expressed their adherence to *Attorney-General*

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posal, except among a particular class of persons, or in such a limited manner, as not to bring it within sect. 7 of the Act. I think, therefore, that the rule ought to be discharged.

PARKE, B.:—

I am of the same opinion. The sole question is whether this gift by will falls within sect. 7 of the Act. It is quite clear that this money is not personal estate of the testator, for he has paid his subscriptions from time to time upon the terms prescribed by the Act, and subject to the regulations which have been made in pursuance of the Act. The moment he paid the money to the trustees of the fund it ceased, I think, to be his money, and it was irrevocably placed in the hands of the trustees. Therefore it was no longer his personal estate. Was it then personal estate of which he had power to dispose as he should think fit? It is perfectly clear that it was not, because by the terms of the rules, which have the force of an Act of Parliament, the destination of the fund is fixed. It is to go to his widow, or children, or relatives, or nominees. It seems to me, therefore, that the case is clearly not within sect. 7, and that no legacy duty is payable.

ALDERSON, B.:—

I am of the same opinion. It seems to me that this money is neither personal estate of the deceased, nor personal estate of which he could dispose as he should think fit. His power of disposal was limited to a particular class out of which he might select.

ROLFE, B.:—

I am of the same opinion. The Act certainly meant to make legacy duty payable only in respect of legacies given either out of the personal estate of the testator, or out of personal estate of which he had an unlimited power of disposition. The latter part of sect. 7 was introduced to prevent the evasion of the Act by a person placing a fund in the hands of trustees in trust for himself during his life, and after his death in trust for such persons as he might direct by his will. The present case has no resemblance whatever to that, for here the subscriber parts, not with a fund, but with a certain annual sum in consideration of which he is to have the power of appointing to his widow and relations, and, in certain specified events, to a nominee, a certain sum to be estimated in proportion to his subscription. It is quite clear that this is neither his personal estate, nor a fund over which he has anything more than a limited and special control.

(1) 1 H. & C. 266.

v. *Rowsell* (1). *In re William Phillips' Insurance* (2) is to the same effect.

The effect of the nomination is only to make the "nominee" an object of the subscriber's power of appointment, but, in order that he may then share in the fund, there must be also an appointment in his favour by the subscriber. Rule 25 of the rules of 1819, which were in force when these policies were effected, is the material one. The governing words of the rule are "in his will." There is a limited power of appointment by will in favour of a defined class of persons. In the present case there is no appointment by the subscriber's will; the persons who are named as legatees in his will are not objects of the power, and, as the lunatic was illegitimate, there could be no one to take under the *Statute of Distributions.* Rule 23 of the rules of 1827 does not really make any alteration; it only enlarges the class of nominees.

There is nothing in what has taken place which can estop the Defendant.

The premiums cannot be recovered. If there was any mistake on the part of the *curator*, it was a mistake of law, not of fact. And there was consideration for the payment of the premiums, for the lunatic might have recovered, and he might then have married and had children, or, at any rate, he might have made a new will.

Giffard, in reply:—

The order of the Court of Session was a good appointment of the fund insured to *Forsyth*, as a nominee, on trust for the persons named as legatees in the particular will. The fund was created by the lunatic's subscriptions, and, if there is a failure of either relations or nominees qualified to take, there would be a resulting trust for him. The case must be treated in the same way as if the lunatic had remained sane, and had nominated the Plaintiff. The rules do not require that the nominee shall be admitted previously to the appointment to him; all that is necessary is that he should be admitted during the life of the subscriber: *In re Maclean's Trusts* (3). There may be a nomination of a person

(1) *Ante*, p. 67, n. (2) 23 Ch. D. 235. (3) Law Rep. 19 Eq. 274.

who is to take as a trustee for other designated persons. That was the opinion of *Malins*, V.C., in *In re Pocock's Policy* (1), and the decision of the Court of Appeal in the same case is not inconsistent with that view. In the other cases which have been referred to there was no nomination of persons who were not relatives of the subscriber.

The directors of the fund are estopped by the representations which they made to *Forsyth* before the application was made to the Court of Session. The object of the proceedings was, as they knew, to enable the *curator* to give a good discharge for the insurance fund without the concurrence of any other person, unless the lunatic recovered his sanity. The subsequent premiums were paid on the faith of this. There was, in truth, a new contract between *Forsyth* and the directors. At any rate, he acted on their representations: *Hammersley* v. *De Biel* (2). The premiums were paid under a mistake of fact, and the consideration for them has failed. They ought to be repaid, if the Plaintiff is not entitled to the proceeds of the insurance. A mistake of private right is not the same thing as a mistake of law: *Cooper* v. *Phibbs* (3); *Bingham* v. *Bingham* (4).

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It has been stated by various Judges before whom questions relating to this fund have come, and it is matter of history, that the reason for its institution was, that the Customs department, like many other public departments, was liable after the death of its employés to applications by their widows and other relations for assistance to enable them to live, under circumstances, no doubt, very often involving great distress, difficulty, pain, and sorrow. To avoid such applications, which were equally difficult to grant or to refuse, it was considered desirable to establish this fund, by contributing to which (the contributions being compulsory to a great extent) the persons employed in the Customs department should effect insurances upon their lives, it being provided that the power of disposing of the sum insured, which an ordinary insurer in an ordinary company would have had,

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(1) Law Rep. 6 Ch. 445.

(2) 12 Cl. & F. 45.

(3) Law Rep. 2 H. L. 149, 170.

(4) 1 Ves. Sen. 126.

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should not exist, but that the insurer should not be able to deprive the persons for whose benefit the fund was instituted of the benefit intended to be conferred upon them by it. [His Lordship referred to the provisions of the Act, and to rule 25 of the rules of 1819, and continued :—] In my opinion, the word "like" in that rule refers to and takes up the word "such" which occurs a little earlier, and the section should be read in this way: "and also, under the admission of the directors, in such manner or proportions as he may think proper, and direct in his will, for the benefit of his nominee or nominees." By that rule the application of the fund was to a certain extent fixed, and, so far as it was not fixed, the fund was (to put it shortly) to go as the subscriber should direct by his will, and, subject thereto, according to the *Statute of Distributions.* There was nothing in the rule enabling him in any way to deal with the fund, except by his will. [His Lordship referred to the rules of 1827, and continued :—]

The provision that the admission of a nominee should take place during the life of the subscriber was, it seems to me, clearly within the powers of the Act, for the nominees are to be approved by the directors, and the directors had, I think, a right to say that their approval must be given in the lifetime of the subscriber.

Upon rule 23 I wish to make two remarks. The first is, that it gives the subscriber a greater power of selection than he had under the rules of 1819. Under those rules the power could be exercised by will only. Under the rules of 1827 it can be exercised "by any deed or instrument, or by his will."

Again, the direction is to be "for the benefit of his widow, children, and relatives, and for such nominees who shall have been duly admitted by the directors." I think that is the same thing as if it had said "for the benefit of his widow, children, and relatives, and for the benefit of such nominees who shall have been duly admitted by the directors," or as if the word "of" had been used instead of the word "for." I think that is clear from the subsequent part of the rule, as well as by some of the other rules. Another alteration was made by the rules of 1836. Mr. *Hoyes*' policies were effected before the rules of 1827, and in the interval between the rules of 1827 and 1836 nothin

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had happened, except that he had become of unsound mind. [His Lordship referred to the rules of 1836, and in particular to the note D to rule 12, and continued:—] That note is not one of the rules, it has no enacting or statutory force as the rules themselves have. It is merely addressed to the subscriber, advising him what his position is. It does not profess in any way to alter the law, and, in my opinion, it did not alter the law. But it did call the attention of the subscribers to the then existing state of the law as it was understood by the parties who were promulgating that note, and the inference I should draw from it would be, that some question of this sort had arisen, that some will had been made which did not make specific mention of the fund, and the question of its effect had arisen for discussion. Whether the question had come before any Court I do not know, but, the question having arisen in some way for discussion, the attention of the subscribers is called to it, in order that there may be no miscarriage by reason of any technical defect in the wills by which they may purport to exercise their power over the fund. I do not think I need refer to any of the later rules.

The 9th section of the Act, as I have already stated, enabled the directors to "admit any person or persons to be the nominee or nominees of any subscriber to the fund." It was argued that the effect of that section was simply this,—that, whereas the objects of the insurance were merely widows, children, and other relatives of the insured, this section enabled him, if the directors should approve, to add to that class any nominee, and that that power, if it was exercised, merely brought the nominee within the class of objects of the subscriber's power of selection, but did not give him any interest in the fund, and that for that purpose there must be some disposition in his favour, giving him an interest in the fund after he had become qualified to receive such an interest. It seems to me that that argument is pushed too far. If there was nothing but a nomination by the insured of a person to stand in the position of a relative, it does not seem to me there would be anything to point out what his interest was, and it may be that, if the insured died intestate and without making any other disposition, the nominee would stand in the same position as a relative taking an interest in the fund. But, on the other hand, if the insured were to make a nomination, and at the same time to say that that nomination was to be for the benefit of the person named, it seems to me that then the nomination would fulfil the double purpose of bringing the person named within the objects of the power, and conferring a benefit upon him.

The next question is, what is the nature of the interest of the insured under such a power of appointment as this, and I think this question is clearly settled by the authorities. The first authority is *Attorney-General* v. *Rowsell* (1), decided by the Court of Exchequer in the year 1844. The question there was, whether legacy duty was payable in respect of the proceeds of an insurance in the fund which the subscriber had disposed of by his will, and that depended upon whether the insurance was or was not the property of the insurer. [His Lordship read the judgments of the Court of Exchequer as above stated, and continued:—]

The matter came before the Court of Exchequer again in *Attorney-General* v. *Abdy* (2). The facts were shortly these: the insured had no wife or child, and he appointed no nominee. By a will made in one of the forms given in the notes to the rules of 1836, he gave the fund to his sister, and the question was whether succession duty was payable. It was held that his interest in the fund was a special property created by his subscription, and that he could dispose of it only in a particular way. Chief Baron *Pollock* put it very neatly thus (3): "Then it is said that the subscriber has only a limited power over the sum assured. But, if he has only power to leave it to a certain class of persons, and does leave it to one of them, that person is a successor within the meaning of the 2nd section of the *Succession Duty Act*, because there is a disposition of property whereby he becomes beneficially entitled to property upon the death of another person. The officer, by payment of the premiums, created the power under which he acted, and, therefore he is the predecessor." And the other Barons gave judgments to the same effect. They held, therefore, that there was a "succession," that there was the relation of predecessor and successor between the insurer and his sister, but they professed to act upon the authority of *Attorney-General* v. *Rowsell* (1), and there is not a word in the judgments from the beginning to the end indicating that the insurer had anything but a power of appointing the fund, or that it was his property in any other sense. It is true that Baron *Bramwell* did say (2) that the insurer's right was "property," but, looking at the whole of his judgment, it is quite clear what he meant was that he had a right to dispose of "property."

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(1) *Ante*, p. 67, n.

(2) 1 H. & C. 266.

(3) 1 H. & C. 295.

Then there is the case of *In re Maclean's Trusts* (3). There an insurance had been effected in the same fund, and the insured in August, 1872, executed, and afterwards deposited with the directors, an instrument by which, purporting to exercise the power conferred by the rules, he appointed that £1400 out of the proceeds of his insurance should at his death be paid to five persons named, who were described as "the present life fund trustees of the *Guardian Fire and Life Assurance Company*," and he requested the directors to admit those persons "as my nominees for the purpose of this appointment," and he declared the appointment "absolutely irrevocable," except with the consent in writing of those persons. He represented to the directors of the fund that "the consideration for the appointment thus made was to be the loan to him by the *Guardian Assurance Company* of a sum of money which he intended to apply in releasing or disencumbering some family property for the ultimate benefit of his family," and the directors under those circumstances duly admitted the persons named to be his nominees in respect of the sum of £1400. The company then advanced him £900, and he covenanted that his heirs, executors, or administrators would, within three months after his death, pay to the company the sum of £1220, with interest from his death until payment, and there was a declaration that the £1400 coming to the trustees of the company under the appointment should be applied first in payment of costs, and then in satisfaction of the £1220 and interest, and that the surplus should (subject to succession duty) be paid to the executors or administrators of the insured. He afterwards by another instrument deposited with the directors, dealt with the residue of the sum insured in a manner which was perfectly in accordance with the rules, and as to which no question arose. After his death the persons interested in the estate of the insured disputed the claim of the insurance company, and the £1400 was paid into Court under the *Trustee Relief Act*. It was held by *Jessel*, M.R., that there was a proper appointment and nomination of the trustees, and that they were entitled to be paid the amount due to them out of the £1400. The only point material to the present case is this, that there might have been a small surplus left after satisfying the £1220, the interest, and the costs out of the £1400, and the question arose how that surplus should go. The Master of the Rolls said (1): "It is suggested that, because the real transaction between the testator and the *Guardian Life Office* was a mortgage, and not an assignment out and out, this was contrary to the principle of the Act; but I do not think it was. The principle of the Act was, to allow the subscriber to dispose absolutely, and as he thought fit, of two-thirds of the capital if he had a wife and children. If he did not dispose of it, then it went according to the directions contained in his will, that is, it remained his absolute property. If he disposed of it by way of mortgage, in this Court that would be a disposition *pro tanto*; and, therefore, whatever he did not thus dispose of, that is, his interest as mortgagor, would still remain his absolute property, and be subject to the dispositions of his will. To that extent, therefore, the assignment would be a direction to pay to his nominees, as trustees for his executors or administrators, instead of to the executors or administrators direct; and why should he not in his lifetime direct the whole disposable share coming to him to be paid to nominees who were, in a certain event, to become trustees for his legal personal representatives? It seems that he had the power so to direct, and that there is no substantial objection to the mode in which that power has been exercised." The only case cited to the Master of the Rolls upon that point was *In re Pocock's Policy* (2), to which I shall have to refer presently. *Attorney-General* v. *Rowsell* (3) and *Attorney-General* v. *Abdy* (4) were not cited to him, though they were afterwards cited

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(1) *Ante*, p. 67, n.

(2) 1 H. & C. 300.

(3) Law Rep. 19 Eq. 274.

(1) Law Rep. 19 Eq. 281.
(2) Law Rep. 6 Ch. 445.
(3) *Ante*, p. 67, n.
(4) 1 H. & C. 266.

upon the second point which arose in the case, viz., whether the £1400 was subject to succession duty. The Master of the Rolls held that it was not subject to succession duty, because it had been assigned in the lifetime of the insured, and was, therefore, expressly exempted from succession duty by the terms of sect. 17 of the *Succession Duty Act*, but he added (1): "The fund will be applied, in the first place, in payment of what is due to the petitioners" (that is, the *Guardian Company*) "for principal, interest, and costs, including their costs of this petition. I suppose the fund will be ample for that purpose; but, if it should not turn out to be sufficient, then the respondents who made the claim will have to pay personally. If there is any surplus, it must be transferred to the suit for the administration of Mr. *Maclean's* estate; and of course that surplus will be liable to succession duty; but I am told that in fact the estate is insolvent." No doubt some of the observations of the Master of the Rolls do, so far as they go, treat the fund as the property of the insured, and as payable to his executors or administrators, and that is inconsistent with the earlier cases to which I have referred, and which had not been cited to the Master of the Rolls; but his observations amounted to no more than a general remark as to a very small possible surplus of a fund, when it was reasonably expected that there might not be any. But, whatever weight may be attributable to those observations of *Jessel*, M.R. (and certainly they are entitled to very great weight), their effect upon the law as declared in the earlier cases is now unimportant, because a similar case afterwards came before the Court of Appeal, when *Jessel*, M.R. was himself present. That case is *In re William Phillips' Insurance* (2), and the point in it was shortly this:—A subscriber to the fund died a widower, leaving children. No nominee had been accepted by the directors in his lifetime. By his will he bequeathed the fund coming from his insurance to a stranger in blood, that is, to a person who was not a relative and not a nominee. Vice-Chancellor *Bacon* held that the legatee was entitled. The Court of Appeal held that "the subscriber had no property in the fund, but only a limited power of appointment over it, and that this power could only be exercised in favour of his

(1) Law Rep. 19 Eq. 285.

(2) 23 Ch. D. 235.

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widow, children, blood relations, and nominees, admitted by the directors in his lifetime; that he had therefore no power to bequeath the fund to a stranger in blood who had not in his lifetime been accepted by the directors as a nominee, and that the fund therefore belonged to the children." The learned Judges all took the same view, but it is sufficient for me to refer to what *Jessel*, M.R., said. He said (1): "I think that under each set of rules the insured has a power of appointment, and nothing more. The wording of the 12th rule" (of 1872) "is a little embarrassed by the use of the words 'as aforesaid' which occur three times, and may refer to two different things; but it is obvious to my mind, when we look at the alternatives, that the rules were intended to remain in substance as they were at first. That being so, there are two decisions on the first set of rules, *Attorney-General* v. *Rowsell* (2), and *Attorney-General* v. *Abdy* (3), and they both tend to the same conclusion, that there is a mere power of appointment, and in default of appointment the fund goes to the persons mentioned in the rules. If there is no widow and no nominee, it goes to the children. Is there any exercise of the power of appointment? I think there is not. The original Act of Parliament took away a certain sum out of the salary of the insurer, which when taken away ceased to be his, and gave him instead of it certain rights, but those rights really had no direct reference to the person paying. The moneys which he was to receive under his insurance did not arise entirely from moneys taken out of his salary. It is plain that many of the officers who were compelled to subscribe would get no benefit out of the fund. That being so, is there anything inconsistent in leaving the directors to say whether or not a nominee of the insured should be accepted? It is quite possible, and I think it was intended by the original Act, that the directors should have a discretion, and should have authority to say, if a man had a wife and several children, that he should not exclude them, and should not be entitled to compel the directors to accept his nominees. No doubt the object of the original Act was to protect the Treasury from claims by the widows and children of these officers by compelling the officers to provide in their lifetime for their widows and children by compulsory savings—for that is what it comes to. That is the primary object of these provisions, and it is quite consistent with that for the insured only to have such powers of appointment as were given him by the rules, and no right of property in the sum insured. I think that is the true view of both sets of rules, and, consequently, that in this case, no nomination having been registered in the lifetime of the officer, there is no nominee who can take, and the children therefore are entitled to what they ask."

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(1) 23 Ch. D. 244.

(2) *Ante*, p. 67, n.

(3) 1 H. & C. 266.

The judgments of Sir *J. Hannen* and Lord Justice *Lindley* are to the same effect. It is clear, therefore, according to those cases, that the insured has no property whatever in the fund. He has a limited special power of appointment in the mode, and in favour of the objects, pointed out by the rules, but he has nothing else.

[His Lordship then referred to the facts of the present case as above stated, and continued :—]

The case which was stated in April, 1842, by Mr. *Forsyth's* solicitors for the opinion of Mr. *Ryder Dean,* the standing counsel to the *Customs Fund,* was not a joint case. It was no doubt stated by them for the opinion of Mr. *Dean* as being the best authority to whom they could go for advice on the subject; and I have no doubt that the solicitor to the fund knew what was about to be done.

That which took place subsequently to the admission of Mr. *Forsyth* as a nominee was altogether immaterial, except so far as the continued payment of the premiums is of importance.

Now what was the position of Mr. *Forsyth* under the appointment? for the Plaintiff stands in the same position in every respect as Mr. *Forsyth* did. In my opinion Mr. *Forsyth* was not duly appointed "nominee" by the order of the Court of Session. It is necessary to consider what was the position of the parties before that order was made. A will made by the lunatic was in existence, by which he gave his property in general terms to certain persons mentioned in it. In my opinion that will did not in any way affect or operate upon his interest in the insurance fund, and that for two reasons which are conclusive. In the first place, the will does not contain any reference either to the power which he had of appointing the fund, or to the fund itself; neither the power nor the property is referred to. That being so, the will as it then stood could not in any way operate upon the fund. In the next place none of the persons who were nominated by the will to take were objects of the power; they were neither "widow, children, or relatives" of the testator, and they were not "nominees," because at that time no nomination of any sort had taken place. Either of those reasons is sufficient to prevent the will from operating on the fund.

What then was the power given by the rules? Under the rules of 1827 it was a power to appoint "by any deed or instrument, or by his will," and under the rules of 1836 it was a power to appoint "by any instrument in writing, signed in the presence of one or more witness or witnesses, and deposited with the directors, or by his will." It does not seem to me to matter much under which of those rules the case comes, because, if the will itself did not operate upon the fund, there was no other instrument, such as is referred to in the rules, which could affect it. There was clearly no instrument signed by Mr. *Hoyes*, and there could not have been any, because at that time he was of unsound mind, and so he remained during the rest of his life. The only instrument (if there be any) besides the will which could affect the fund is the order of the Court of Session, which was made on the application of the committee. It seems to me that that order is not an instrument which in any way deals with the fund, and, moreover, the Court of Session, having, as is admitted by both parties, the same jurisdiction in *Scotland* as the Lord Chancellor has in *England* to deal with the estates of lunatics, had, in my opinion, no power to make such a nomination, just as the Lord Chancellor would have no power to make such a nomination in *England*. An admission was made by the counsel for the Defendant which appeared to me not very clear or precise, and to be capable of misconstruction, and in order to clear this up I offered the Plaintiff's counsel this morning an opportunity of reading any further evidence which they had, if they thought it desirable to do so. They have declined to do that, and I must deal with the matter on the assumption that the Court in *Scotland* had precisely the same (but no larger) power of dealing with the interest of the insured in this fund as if the insured had been domiciled in *England*, confined in a lunatic asylum in *England*, and the Lord Chancellor had been dealing with the fund in *England*. It is very important to remember that this fund was not the property of the lunatic. If it had been his property, the matter would, in my opinion, have stood in a totally different position. But he had no property in it; he had only a special power of directing among which of a very limited class of objects the fund was to be divided. It appears to me that, if this had been an English case, it would be preposterous to suppose that the Lord Chancellor would have had any power to make a "nomination" on behalf of the lunatic. Suppose that a fund was settled "in trust for the children of *X.* as *X.* shall by a deed or will appoint," and *X.* had become a lunatic, could the Lord Chancellor execute a deed or a will exercising that power on behalf of the lunatic? Certainly not. Supposing the limitation had been "in trust for the children of *X.* as *X.* shall appoint," not saying by deed or will, could that power be exercised by the Lord Chancellor? Certainly not. And it appears to me that the Court of Session in *Scotland*, exercising precisely the same powers and having precisely the same authority with regard to lunatics in *Scotland*, could not by anything which they did make that document a will which immediately before their nomination was not a will operating in any way upon the lunatic's interest in the fund.

The case of *Ex parte Whitbread* (1), which was referred to in Mr. *Forsyth's* petition, and was, I have no doubt, before the Court of Session, does not appear to me to assist the Plaintiff at all. The matter decided is sufficiently stated in the marginal note thus: "The practice of making an allowance to the immediate relations of a lunatic, other than those whom the lunatic would be bound to provide for by law, extended to the case of brothers and sisters and their children, and founded not on any supposed interest in the property, which cannot exist during the lunatic's lifetime, but upon the principle that the Court will act with reference to the lunatic, and for his benefit, as it is probable the lunatic himself would have acted if of sound mind. The amount and proportions of such an allowance are, therefore, entirely in the discretion of the Court." That case, in my opinion, has no application whatever to one in which the property of the lunatic was not being dealt with at all. The question whether the persons named in this will could or could not take after his death, was a matter which could not possibly affect the lunatic beneficially or otherwise; it was the case of a lunatic having a mere dry power of selection, and, in my opinion, such a power cannot be exercised on his behalf by the Lord Chancellor, or by any other Court which has only the same jurisdiction which the Lord Chancellor has. There is no precedent that I am aware of for any such authority being vested in the Lord Chancellor.

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(1) 2 Mer. 99.

Under these circumstances it appears to me that the nomination of Mr. *Forsyth* by the order of the Court of Session had not the effect of making him a "nominee."

There is this further difficulty in the way of the Plaintiff which prevents my deciding in his favour. It appears to me that the "nominee" must be a person who is to take beneficially, and that he cannot take merely as a trustee for other persons. I have pointed out that the words, "for the benefit of," in rule 23 of 1827, apply to nominees, as well as to the widow, children, and relatives of the subscriber. It is admitted that neither Mr. *Forsyth* nor the Plaintiff took any beneficial interest, and that the Plaintiff is at the utmost the hand to receive the money, which he would have to apply in the lunacy for the benefit of the persons interested under the will of the lunatic. It appears to me that a person who is not a beneficiary cannot be nominated according to the rules. Indeed the Court of Session took precisely the same view of the rules as I do, because their order nominated the petitioner "nominee of *Hoyes*, for behoof of the legatees" under his will to his interest as a subscriber to the fund, "in terms of the statute and regulations," and directed the petitioner to communicate the appointment to the directors "for their acceptance and admission as parties interested in the fund in terms of the statute and regulations." Therefore, the order of the Court of Session contemplated that the persons to be admitted should be, not Mr. *Forsyth*, but the legatees. They are to be accepted, and they are to be admitted, as parties interested.

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That, I think, beyond all question, is the meaning of the order of the Court of Session.

But it is said that there are two cases which to some extent conflict with the view which I have expressed. The first is *In re Maclean's Trusts* (1), to which I have already referred. It is said that in that case the direction to pay to the nominees of the insured was held not to be invalid, although it made those persons to some extent trustees for the executors. I have already pointed out that the interest of the executors was so very slight that it cannot be said that there was any material decision upon that point. And I could not accept that decision as an authority upon that point, even if it were not displaced by *In re William Phillips' Insurance* (2), because it is clearly inconsistent with the views expressed by all the Barons of the Court of Exchequer in *Attorney-General* v. *Rowsell* (3), and I think it is also inconsistent with the judgments of the Court of Appeal in *In re Pocock's Policy* (4).

In that case a subscriber to the fund made a settlement of the whole of his insurance fund on the marriage of his daughter, and he did so by an instrument which, beyond all question, referred to the fund, and was a good exercise of the power of appointment, so far as that went. The question was, whether the mode in which it was exercised was valid. He executed an instrument in the form prescribed by the rules, by which he directed that the fund should be paid to the two trustees of the settlement, and this document was forwarded to the directors by the daughter's husband, and in reply the secretary wrote to him as follows:—"We have received the directions of Mr. *Pocock* forwarded in your letter of the 22nd instant; and, if the trusts of the marriage settlement provide that the insurance of Mr. *Pocock* should be paid over to the trustees for the sole benefit of his daughter, or for the benefit of her issue, the directions in that case would be in strict conformity with the rules; but, should the appointment go to the payment of the money over to the husband in the event of the decease of his wife, and if her death should happen before that of her father, we think a difficulty would arise, to obviate which we would advise Mr. *Pocock* to write to the directors to admit his son-in-law, Mr. *W. C. Cobbold*, his nominee for the purpose of the marriage settlement." Mr. *Pocock*, however, took no further steps in the matter, and no admittance of a nominee was made by the directors of the fund. The daughter died some years afterwards, intestate, leaving one child. Her father died three years afterwards, leaving one son, that son and the deceased daughter being his only children. The husband of the deceased daughter presented a petition for the payment of the fund (which had been paid into Court) to the trustees for the purposes of the marriage settlement. The son opposed the petition, claiming that the fund belonged in equal moieties to himself and the child of his deceased sister. Vice-Chancellor *Malins* held that the trustees of the settlement must be taken to have been properly nominated, and that as nominees they were entitled to the fund. He held that, the nomination having been communicated to the directors, it was their duty, if they had any objection to the nominees, to state their objection at once, and that, as they did not raise any objection, the trustees must be taken to have been duly admitted as nominees. The Vice-Chancellor said (1): "I totally dissent from the argument of Mr. *Pearson*, that no person can be a nominee except one who is to take beneficially." I must confess it seems to me that this view is not only at variance with the decision of the learned Barons in *Attorney-General* v. *Rowsell* (2), but that it was overruled by the Court of Appeal in the very same case. The Vice-Chancellor having directed payment of the fund to the trustees of the settlement, the son of the insured appealed, and the Court of Appeal, though they affirmed the order, did so upon totally different grounds. Lord Justice *James* said (3): "I am of opinion that the order of the Vice-Chancellor must stand, although not exactly on the same grounds as those on which the Vice-Chancellor has put it. The view which I take of the matter appears to me quite consistent with every word of the Act of Parliament and of the rules of the society." Then he pointed out that (to put it shortly) what the father had done amounted to a settlement in favour of the daughter. The

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(1) Law Rep. 19 Eq. 274.

(2) 23 Ch. D. 235.

(3) *Ante*, p. 67, n.

(4) Law Rep. 6 Ch. 445.

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(1) Law Rep. 6 Ch. 450, n.

(2) *Ante*, p. 67, n.

(3) Law Rep. 6 Ch. 452.

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daughter was, beyond all question, an object of the power. The settlement was made upon her marriage, and, although it gave a life interest in remainder to her husband, it was a settlement for her benefit, and was strictly within the powers conferred upon the insured by the rules. That that was the view taken by Lord Justice *James* is clear from his judgment, for he pointed out that, although the husband might not be able to take under the appointment itself, yet the appointment for the benefit of the daughter was good, and the husband would take the fund for his life as undisposed of by her, and as her administrator. Lord Justice *Mellish* took the same view. The grounds of these judgments seem to me entirely inconsistent with the ground of the Vice-Chancellor's decision. His order was affirmed, because the daughter was the person beneficially entitled. It was not necessary that she should be nominated, and the appointment in her favour was perfectly well effected by nominating the two trustees for her benefit.

Upon the authority of that decision of the Court of Appeal and of *Attorney-General* v. *Rowsell* (1), and having regard to the terms of the order of the Court of Session, I have no difficulty in giving effect to my own view of the true construction of the rules, viz., that the person who is to take beneficially—the person for whose benefit a nomination is made—is the person who must be approved and accepted by the directors, and not a person who is nominated as trustee for third persons who are not objects of the power. If, indeed, the person who is to take beneficially is effectually nominated, if he is not a relation of the insured, or is effectually appointed if he is a relation, the appointment in his favour is not prejudiced by the fund being appointed to a trustee for his benefit. It seems to me, therefore, that the persons who ought to have been nominated and approved by the directors were the legatees under the will as the Court of Session intended, and not Mr. *Forsyth* or Mr. *Urquhart*. On these two grounds I hold that the nomination made by the Court of Session is of no effect.

But this further point was taken, that, whatever the position of matters might have been but for what took place on the admission of *Forsyth* and *Urquhart*, the Defendant is prevented by what then took place from saying that there was not a good nomination of *Forsyth* and *Urquhart*. In my opinion that is not so. From beginning to end the action was taken by Mr. *Forsyth* at the instance of the persons named as beneficiaries in the will of Mr. *Hoyes*, for the purpose of securing the benefit of the insurance for them. The directors of the fund were willing, if they could, to give effect to that will; but, so far from making any representation or any statement which can work any estoppel against them, or cast any obligation upon them, in my view they simply acquiesced in the course which was put before them after a good deal of pressure on the part of Mr. *Forsyth*. Therefore the subsequent acts of the directors do not, in my opinion, cure the defect which arises from the fact that there was no proper nomination made before the admission.

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(1) *Ante*, p. 67, n.

But it is said that, even if the insurance cannot be recovered, at any rate the premiums ought to be returned, because they were paid under a mistake. In my opinion I cannot order the premiums to be returned. The matter was fairly and fully before the advisers of Mr. *Forsyth*, who took what they considered the best advice upon the subject. They went to the Court for authority and they got it. After it had been pointed out to them that there were difficulties in their way, they, of their own accord, with the sanction of the directors of the fund, took the opinion of the standing counsel to the fund, and they were fully advised as to their position. Under these circumstances it appears to me that, if they did misunderstand their position, it was their own fault, if fault at all: at any rate it was not a fault attributable to the directors of the fund. If there was any mistake, it was a mistake of law as to the real position of the parties, and not a mistake of fact which can give any claim to have the premiums returned. It was suggested that when Mr. *Forsyth* was admitted there was some novation, a new contract by which the directors were bound. In my opinion a new contract was the very last thing that the parties were thinking about. They were considering what they could do to give effect to the existing contract, and to the will which had been already made. If there had been a new contract it would have made it all the more difficult to support the will which had been previously executed, and to apply it to a fund arising under a contract not made by the testator, but made by his committee long after the execution of the will. Therefore, in my opinion, a novation was the very last thing in the contemplation of the parties, and there is no reference to it from beginning to end, either in the correspondence or in the petition to the Court of Session.

Nor can it, in my opinion, be said that there was any failure of consideration for the premiums paid after the admission of Mr. *Forsyth*, because, in point of fact those premiums were doing their work, and they might have had the effect of securing the fund for the benefit of the person who had the power of directing how it should go. Suppose Mr. *Hoyes* had become of sound mind again and had married and had died leaving a widow, the widow must under the rules have taken a part of the fund. Her interest could not be displaced. The premiums were earning the right to have that interest paid to the widow, in case there should happen to be a widow in existence at his death. In the same way there might have been children, and they would have taken an interest in the fund. And, if there had been no widow or children, Mr. *Hoyes*, if he had recovered his senses, might have revoked the will which he had made, and have appointed the fund to some other nominee. For these purposes it was considered advisable by the *curator*, acting on behalf of the lunatic's family, that the premiums should be paid and the policy kept up, and I cannot say that, because none of the events contemplated as possible have in fact happened, those payments were made without consideration. It is quite true that in the result, according to the view which I have taken, the insurer gets nothing by the payment of the premiums, but it is only like any other case in which a man is content to pay money during his lifetime with a view to having, upon a given contingency, a power of dealing with a fund thereby created. If the contingency happens, he has the benefit of the payments; if it does not happen, the payments are thrown away.

Under these circumstances it appears to me that the Plaintiff is not entitled to have the premiums repaid.

Some nice questions of domicil were mooted, but after the conclusions at which I have arrived it is not necessary that I should say anything about them.

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BUTTERFIELD.

The action, in my opinion, fails altogether; but, having regard to all the circumstances, I dismiss it without costs.

Solicitors for Plaintiff: *Ford, Ranken Ford, & Ford.*

Solicitors for Defendant: *Foss & Ledsam.*

W. L. C.

WIGRAM *v.* FRYER.

[1887 W. 1463.]

NORTH, J.
1887
May 6, 13, 25.

Act of Parliament—Construction—Repeal—Public Undertaking—Easement—Ancient Lights—Lands Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 68 [*Revised Ed. Statutes, vol. ix., p.* 642]—*Injunction—Lands injuriously affected—Public Body—Ultrà vires.*

By an Act incorporating the *Lands Clauses Consolidation Acts* the Metropolitan Board of Works were authorized to acquire specified land for the purpose of (among others) the *G.* street improvement, and to purchase easements over such land. By sect. 33 of their Act they were required to sell or let specified portions of the land for the construction and maintenance of artizans' dwellings, so that the land should be cleared of existing houses by degrees and a minimum number of dwellings should be provided. By an Amendment Act the Board were required to devote three plots of land, the subject of the *G.* improvement, to provide a minimum number of artizans' dwellings, and sect. 33 of the principal Act was repealed with respect to the *G.* improvement:—

Held (1), that provisions as to selling and letting similar to those contained in sect. 33 of the principal Act were implied by the Amendment Act. (2.) That an adjoining owner had no right to an injunction to restrain a tenant of the Board from obstructing ancient lights by building artizans' dwellings on one of the plots of land devoted to that purpose, but that his right was to compensation from the Board under sect. 68 of the *Lands Clauses Consolidation Act,* 1845. (3.) That the Board could not impose on their tenant a liability to be restrained from building the artizans' dwellings so as to obstruct access of light to ancient lights.

BY the *Metropolitan Street Improvements Act,* 1877 (40 & 41 Vict. c. ccxxxv.), s. 2, it was enacted, "The *Lands Clauses Consolidation Acts,* 1845, 1860, and 1869" (except sect. 133 of the first-mentioned Act, and also such of the provisions of those Acts as are varied by or excepted from or inconsistent with this Act), "are incorporated with and form part of this Act."

Sect. 4 enacted that, "Subject to the provisions of this Act, the Board may, upon the lands to be acquired by them under the powers of this Act and shewn upon the deposited plans, make and carry into execution all or any of" certain "new streets and street improvements," including "the widening of *Gray's Inn Road* on its east side, all in the parishes of *St. Andrew, Holborn,* and *St. Pancras,* or one of them, commencing in *High Holborn,* in the parish of *St. Andrew, Holborn,* and terminating opposite *Henry Street,* in the parishes of *St. Andrew, Holborn,* and *St. Pancras,* or one of them."

Sect. 7 was as follows: "The Board may purchase any easement which they may require to extinguish for the purposes of the improvements, and for the purposes of every such purchase the term 'lands' in the *Lands Clauses Consolidation Acts* shall be deemed to include easements."

Sect. 25 gave the Board power to let surplus land on building leases for not more than ninety-nine years.

Sect 33 was as follows: "And whereas the making of the street improvements in this Act referred to involves the removal of many houses referred to in the immediately preceding enactment, and it is expedient that provision be made for the accommodation of such of the labouring classes as will be displaced by such removal: therefore the Board in carrying into effect the provisions of this Act shall, subject to the provisions of this Act, from time to time, for the purpose of providing such accommodation as aforesaid, acquire or appropriate so much of the lands coloured blue on a copy of the deposited plans signed by Viscount *Hardinge,* the chairman of the committee to whom this Act was as a bill referred in the House of Lords, or such other lands as one of Her Majesty's principal secretaries of state shall from time to time deem sufficient; and the Board may for the purpose of procuring such accommodation appropriate any lands for the time being belonging to them, or which they have power to acquire, and not required for any other purpose, and may purchase by agreement such further lands as may be necessary for such purpose.

"The Board shall, as soon as may be after the acquisition or appropriation of any such lands, sell or let the same upon building lease for the purpose of the erection or adaptation and continuance thereupon of suitable dwelling-houses or lodging-houses for persons of the labouring classes, and the Board shall have full power and authority to make and enter into such contracts and agreements as to them shall seem fit with respect to the sale or letting of such lands or any part of the same, and to the terms, conditions, and restrictions as to the elevation, size, and design of the dwelling-houses to be erected or adapted and continued thereupon, for the purposes aforesaid, and to the extent of the accommodation to be afforded thereby:

"Provided always, that if any difference arise between the Board and any company, person, or persons desiring to purchase or lease such lands or any part of the same, and making an offer in writing to the Board for such purchase or leasing, as to the reasonableness of such offer, or of the terms, conditions, and restrictions therein contained, and subject to which such lands or such part of the same are to be sold or let, or with reference to the dwelling-houses to be erected or adapted and continued thereupon, for the purposes aforesaid, or the extent of the accommodation to be provided thereby, such difference shall from time to time be determined by one of Her Majesty's principal secretaries of state, or by such person as such secretary of state may appoint for such purpose, who shall, having regard to the provisions of this enactment and the accommodation thereby intended to be provided, decide as to the reasonableness of such offer, and as to whether the same shall be accepted by the Board or not, and as to whether the same shall be so accepted, subject to the terms, conditions, and restrictions therein contained, and such decision shall be binding as well upon such company, person, or persons as on the Board, and such secretary of state or person may also decide as to the costs incident to such decision and the parties by whom the same shall be borne and paid in whole or in part, and such decision shall be final and conclusive on the parties affected thereby: Provided also, that if within three years after the acquisition or appropriation of any such lands, in the manner and for the purposes aforesaid, the Board shall have failed to sell or let such lands for the erection or adaptation and continuance thereupon of such dwelling-houses as aforesaid, one of Her Majesty's principal secretaries of state shall order the said lands to be sold or let by public auction or private tender, with full power to fix a reserve price, subject to the like terms, conditions, and restrictions as under the preceding provisions of this enactment may be imposed by the Board, or to such modifications (if any) of the same as in the opinion of such secretary of state may be proper to give due effect to the purposes of this enactment, and to a special condition on the part of the purchaser or lessee that he will erect or adapt and continue upon such lands dwelling-houses for the labouring classes, in accordance with such plans as may be approved by such secretary of state and the Board, and subject to such reservations and regulations as the said secretary of state may deem necessary:

"Provided always, that before the Board shall, without the consent of one of Her Majesty's principal secretaries of state, take for the purposes of this Act fifteen houses or more occupied at the time of the passing of this Act either wholly or partially by persons belonging to the labouring classes as tenants or lodgers, the Board shall prove to the satisfaction of such secretary of state that sufficient accommodation in suitable dwellings has been provided elsewhere upon the before-mentioned lands coloured blue, or upon such other lands as may be approved by such secretary of state, for the same number of persons, having regard to the numbers set forth in the schedule to this Act, and to the details relating thereto, proved before the said committee and deposited at the Home Office: Provided further, that one of Her Majesty's principal secretaries of state may, if he think fit, after or even before the Board has acquired any of the said lands so coloured blue, release the Board from the obligations imposed upon them by this enactment with respect to such lands or any part thereof, provided the Board substitute in lieu thereof other lands equally available for the purposes described in this enactment."

The *Metropolitan Streets Improvement Act* (1877) *Amendment Act*, 1882 (45 & 46 Vict. c. ccxxii.), after reciting the principal Act recited as follows:—

"And whereas by sect. 33 of the Act of 1877 provision was made with respect to the accommodation of such of the labouring classes as would be displaced in the execution of the purposes of the said Act by the removal of the houses occupied either wholly or in part by them:

"And by the said section certain obligations in relation to such removal and accommodation were imposed upon the Board:

"And whereas by reason of such obligations the Board have been prevented from carrying into effect certain of the purposes of the said Act:

"And whereas a select committee was appointed by the House of Commons on the 20th of February, 1882, to consider the working of the *Artizans' and Labourers' Dwellings Improvement Act*, 1875, and the amending Act of 1879 with a view of considering how the expense of and the delay and difficulty in carrying out these Acts might be reduced, and also of inquiring into any causes which might have prevented the reconstruction of dwellings for the artizan class to the full extent contemplated and authorized by these Acts, and of recommending such amendments as might be most expedient for carrying out the full intention of these Acts, and also to consider the working of the *Metropolitan Streets Improvement Acts*, 1872 and 1877 and of 31 & 32 Vict. c. 130, and 42 & 43 Vict. c. 64:

"And whereas the said committee on the 19th day of June, 1882, made their report to the House of Commons and thereby recommended amongst other matters that subject to certain conditions in the said report stated the Board should forthwith be relieved of the obligations imposed by the said sect. 33 of the Act of 1877 so far as the same were applicable (*inter alia*) to the *Gray's Inn Road* improvement by the Act of 1877 authorized:

"And whereas it is expedient to give effect to such recommendations and for such purpose to make provisions such as are in this Act continued:

"And whereas the Board have caused a plan called and in this Act referred to as 'the *Gray's Inn Road* plan' to be prepared shewing the lands to be taken for the purposes of the *Gray's Inn Road* improvement authorized by the Act of 1877 and the same has been deposited with the respective clerks of the peace for the county of *Middlesex* and for the city of *Westminster*."

Sect. 2 enacted: "The Board shall in the exercise of the powers of the Act of 1877 conferred upon them for the taking of lands for the purposes of the *Gray's Inn Road* improvement by the said Act authorized be subject to the conditions following:—

"(1.) The Board may as soon as may be after the passing of this Act exercise the said powers with respect to the lands coloured blue on the *Gray's Inn Road* plan and lying south of *Baldwin's Gardens* and such parts of the lands coloured pink and yellow on the *Gray's Inn Road* plan as are situate between *Holborn* and the Town Hall of the *Holborn* District Board of Works.

"(2.) The said lands coloured blue shall be appropriated exclusively to the erection of artizans' dwellings, and when artizans' dwellings have been erected thereon but not before the Board may remove the buildings on the lands coloured green on the *Gray's Inn Road* plan, and the said lands coloured green shall be appropriated exclusively to the erection of artizans' dwellings, and when artizans' dwellings have been erected on the said lands coloured green but not before the Board may remove the buildings on the remainder of the lands situate to the north of the said Town Hall and authorized to be taken by the Act of 1877 for the purposes of the *Gray's Inn Road* improvement, but the part of the said lands coloured purple on the *Gray's Inn Road* plan except such portion thereof as may be appropriated to the widening of *Elm Street* shall be appropriated exclusively to the erection of artizans' dwellings.

"(3.) The artizans' dwellings to be erected on the lands coloured blue, green and purple respectively on the *Gray's Inn Road* plan shall be sufficient to accommodate not less than 1200 persons belonging to the labouring classes.

"(4.) All the lands coloured pink on the *Gray's Inn Road* plan shall be appropriated exclusively to the widening of *Gray's Inn Road* as by the Act of 1877 authorized."

All the lands referred to in this section were authorized to be taken by the principal Act; but were not identical with the land coloured blue in the deposited plans referred to in the principal Act of 1877.

Sect. 3 enacted: "From and after the passing of this Act the provisions contained in sect. 33 of the Act of 1877 shall cease to be in force with respect to the lands shewn on the *Gray's Inn Road* plan, and authorized to be taken by the Act of 1877, and in relation thereto the Act of 1877 shall be read as though the said section were not contained therein."

By an agreement dated the 13th of August, 1886, between the Metropolitan Board of Works as vendor and *Thomas Pink* (since deceased) as purchaser, after reciting that the land the subject of the agreement had been acquired by the Board under the *Metropolitan Streets Improvement Act*, 1877, and that under that Act and the Amendment Act of 1882 the Board were authorized and required to appropriate it to the erection thereon of dwellings for artizans and other persons of the labouring class, the Board agreed to sell to *Pink* for the purpose of the erection and maintenance thereon as was thereinafter provided of dwellings or lodging-houses for artizans and other persons of the labouring classes within the meaning of the said Acts, a lease in the form set out in a schedule for the term of 999 years of plot F. (which plot was identical with the piece of land coloured green in the *Gray's Inn Road* plan referred to in the Amendment Act of 1882), at the rent of 1*s.* a year. The lease was agreed to be sold "subject to the obligations imposed by the said Acts and to all rights and easements (if any) existing in or over the said piece of land," and "subject to any shores or struts thereon which may have been placed thereon for the purpose of supporting or which support any land, building or erection adjacent or near thereto, and subject to the rights (if any) of" adjacent owners. The purchaser agreed to prepare and submit to the Board plans, elevations, sections, and specifications of the dwelling-houses or lodging-houses.

The form of lease in the schedule to the agreement contained a covenant to submit plans and elevations, sections and working specifications, to the Board for their approval, and after such approval to build in accordance therewith; and a covenant during the first eighty years of the term to "maintain in good repair, and with proper sanitary arrangements fit for and devoted to use and occupation by artizans and other persons of the labouring class, within the meaning of the said Acts, the dwelling-houses or lodging-houses to be built in accordance with the last preceding covenant," and to maintain and rebuild the same, and not at any time during the first eighty years of the term "to add to or alter the character of the said dwelling-houses or lodging-houses without the consent of the Board or their successors in writing."

The executors of *Thomas Pink* entered into an agreement with the Defendant, dated the 23rd of December, 1886, which, after reciting that plans, elevations, sections, and specifications for the erection of dwellings for artizans and other persons of the labouring class on plot F had been prepared and approved by the Board, provided for the granting of a sub-lease to the Defendant for 900 years of plot F in accordance with a form of lease in the schedule thereto. This agreement and the form of lease in the schedule to it contained provisions similar, *mutatis mutandis*, to those contained in the agreement between the Board and *Pink* and the form of lease in the schedule thereto.

The Plaintiffs were the owners in fee simple of houses on the north side of *Portpool Lane*, *Gray's Inn Road*, and persons holding under them. These houses were new; portions of the windows occupied the same position as portions of old windows. The Defendant *Fryer* had begun to construct artizans' dwellings in accordance with his contract on the land described as plot F in the agreements above referred to, and which abutted on the south side of *Portpool Lane*, immediately opposite the Plaintiffs' houses. The Plaintiffs claimed an injunction to restrain his erecting such buildings so as to interfere with their ancient lights. A motion was now made on the part of the Plaintiffs for an interim injunction till the trial in terms of the claim.

Cozens-Hardy, Q.C., and *Byrne*, for the Plaintiffs:—

There are two cases, *Clark* v. *School Board for London* (1), and *Duke of Bedford* v. *Dawson* (2), where it has been decided that where a public body, under certain circumstances, takes land under the *Lands Clauses Acts* for the erection by themselves of a public building, persons whose access of light is interfered with have no right to an injunction to restrain such interference, but have a remedy only under sect. 68 of the *Lands Clauses Act*, 1845, for compensation in respect of the injurious effect to their land.

(1) Law Rep. 9 Ch. 120.

(2) Law Rep. 20 Eq. 353.

Putting these cases aside, there can be no question that the Plaintiffs would be entitled to an injunction. The Defendant is not protected by those decisions: in the first place, because the Metropolitan Board is not in the position of the defendants to those actions, and the building of dwelling-houses for the poor is not the same thing as the building of a public work. In the second place, the indemnity does not extend to a private person, and the Metropolitan Board are not doing the work themselves. And, in the third place, the work is not done in accordance with any provisions of the Acts. Sect. 33 of the Act of 1877 is expressly repealed by the 3rd section of the Amendment Act so far as it relates to the *Gray's Inn Road* improvement. Independently of that section there is no power in either Act to grant such lease as the Board has agreed to grant. Moreover, both the agreement between the Board and *Pink* and that between *Pink's* executors and the Defendant are drawn with the very object of making the lessee liable to existing easements, and to free the Board from liability to pay compensation. No compensation could be got from any one except the Board. We submit, therefore, that the Defendant, if not liable otherwise, has by contract submitted to be liable to an injunction restraining interference with easements.

Giffard, Q.C., and *Creed*, for the Defendant:—

There is no distinction between this case and *Clark* v. *School Board for London* (1) or *Duke of Bedford* v. *Dawson* (2) either as to any power of purchasing easements or as to the *status* of the Metropolitan Board as compared to any other public body of undertakers, or as to the public nature of the undertaking; nor can it matter that the work is carried out by or delegated to a third person. If, as we do not admit, it made any matter that the carrying out the object by lease was irregular, it is clear that there is no irregularity, it was necessary that the Board should act in some such way as they have done; they have no power or machinery to put up the dwellings themselves; some power to do what they are expressly obliged to do is of necessity implied; these powers are naturally similar powers to those the Legislature has given for other improvements of a similar kind in the Metropolis; in other words, we say that sect. 33 of the Act of 1877 is not repealed for all purposes in respect of the *Gray's Inn Road* improvement. The agreement between the Board and *Pink*, and the sub-agreement between *Pink's* executors and the Defendant, do not, and cannot, affect third persons, they are not intended to give adjoining owners rights they would not otherwise have. The immunity from injunction is a statutory right given to the Board, and therefore applies to persons acting under them for the authorized public purposes, of which the Board cannot deprive themselves or the persons doing the public work.

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(1) Law Rep. 9 Ch. 120.

(2) Law Rep. 20 Eq. 353.

Cozens-Hardy, in reply.

1887. May 25. NORTH, J. (stated the facts and the provisions of the two Acts above referred to, with reference to the 7th section of the Act of 1877, and continued):—

Under that section, independent of authority, I should have thought that an easement of light over a neighbouring property was an easement which the Board might purchase under that Act, that is to say, purchase in the usual way by notice. But it has been held by the two cases of *Clark* v. *School Board for London* (1) and *Duke of Bedford* v. *Dawson* (2) (and those are decisions which I am very glad to have for my guidance), that the interference by the Board with the access of light, over the premises they are taking or using, to the neighbouring premises, is a matter with respect to which the person injured may obtain compensation under the 68th section of the *Lands Clauses Act*, that is to say, by applying for compensation for the injury done at any time, even after the works are completed, and not by way of injunction to restrain the work being done. I said the "Board"; but neither of these two cases related to the Metropolitan Board of Works. One was under the *Education Acts* relating to the School Board of *London*, and the other was with reference to the Clearing House. I have looked at those two cases and the sections of the Acts on which they were founded,

(1) Law Rep. 9 Ch. 120.

(2) Law Rep. 20 Eq. 353.

and I see no substantial distinction between the cases of those bodies under their Acts, and the case of the Metropolitan Board of Works under the present Act.

[In referring to the restrictions and obligations imposed by the 33rd section of the Act of 1877, his Lordship said:—]

They shew that the paramount object is to have the lands on which artizans' dwellings were intended to be erected devoted to the purpose of building houses of this sort for the labouring classes, and that the Metropolitan Board of Works are merely an instrument; with considerable discretion and control no doubt, but they are not absolute owners of the property, because they are subject to the control of the secretary of state.

[After stating the effect of the Amendment Act, 1882, his Lordship continued:—]

Now the question is, what is the meaning of the 3rd section of the Amendment Act of 1882, as applicable to the Act of 1877? Is, for the present purpose, the Act of 1877 to be read as if that section had not been contained in any way whatever within that Act, as that section of the Amendment Act would seem to imply; or is it to receive some other modified meaning, having regard to the language of the Act, the state of things existing immediately before the passing of the Act, and the duties imposed upon the Metropolitan Board of Works by this Act itself?

Now, it is clear, under the original Act, that the erection of these additional buildings for the labouring classes was imperatively required by the terms of the Act itself. It is clear, also, that by the Act of 1882 similar buildings were also required. Nothing in the Act of 1882 in any way removes the obligation of erecting such buildings, although the mode of doing it may no doubt be modified by the later Act as distinguished from the earlier Act. It is clear that the lands coloured blue first, and afterwards that the lands coloured green on the *Gray's Inn Road* improvement map or plan of 1882 are to be appropriated to the erection of artizans' dwellings. How is that to be done? It is suggested that the 33rd section of the Act of 1877 is to be entirely removed and taken, so far as relates to the *Gray's Inn Road* improvement, as if it had never been enacted at all. Under those circumstance, how was the erection of the artizans' buildings, imperatively required by the Act of 1882, to be carried out? I do not see how it could be done.

I have looked at other Acts which have been passed with reference to the erection of artizans' dwellings. They were not referred to in the course of the argument; but I have looked at such of them as I have been able to find. I cannot find that under those Acts the Board has any power on this land to erect any buildings whatever. The principal Act is the Act of 1875 amended in 1879. Under that Act it is clear that the Metropolitan Board of Works have power to erect buildings under certain circumstances. But in the first place that Act is confined to what are called unhealthy areas, and there is no suggestion that the land upon which these houses are falls under that category; and, in the next place, it is only to be put in force by means of certain machinery pointed out by the Act. It is clear in the present case what has been done has been to follow the powers given, or purported to be given, by the two Acts I have been reading, and no appeal is made to the powers of the other Acts which I have just mentioned.

Then, in the next place, even under those Acts the paramount object is that the Metropolitan Board of Works shall let or sell the property they take; and although there is a power given to them to construct houses themselves in certain cases, yet it is only to be done by means of powers created by that Act authorizing them to raise money for the purpose; and there is nothing of that sort, of course, in the present Act.

Looking, therefore, at the Acts so far as I have been able to look them up, I find nothing that would enable the Metropolitan Board of Works, outside of the two Acts now before me, to build on these two pieces of land the buildings which the Act of 1882 contemplates shall, beyond all question, be erected on that land for the purposes mentioned in that Act. It seems to me, therefore, that sect. 33 of the Act of 1877 is not wholly out of the case. It may be that in terms it is to be read as not being in the Act; but then the powers given and the obligation imposed upon the Metropolitan Board of Works seem to me to be such that they cannot have effect given to them unless by this Act itself. Powers —I do not say in the same terms precisely, but to the same effect—

are by implication conferred upon the Board such as were in express terms conferred by the Act of 1877. It is a very lamentable way of legislating, that one should be driven to get at the meaning of these Acts by removing difficulties (as far as can be done) by construction, rather than that the intention of the Legislature should be clearly expressed upon the face of the Act.

Then there is another thing also to be observed. So far as the report of the select committee is recited in the Act, the recommendations contained in it are of the utmost importance in considering what the effect of the Act is. They state what the difficulties are. Then the Act recites that certain obligations in relation to the removal of existing houses and the accommodation of the labouring classes were imposed upon the Board by the Act of 1877, that by reason of those obligations they have been prevented from carrying into effect certain of the purposes of the Act; and they recommend that, subject to certain conditions, the Board shall be relieved of the obligation imposed by sect. 33, as far as the same is applicable to the *Gray's Inn Road* improvements, and that it is expedient to give such relief by this Act.

Now what obligations are they relieved from by this Act? They are not relieved from the obligation of taking the whole of the land coloured green in the *Gray's Inn Road.* It is clear it must be taken, and it must be employed for the purposes intended. It seems to me, therefore, that the obligation of taking it and doing what that section authorizes, namely, selling it or letting it for the purpose of erecting suitable dwelling-houses for the labouring classes is a duty which is continued by this Act, and is imposed upon them; notwithstanding the section in the Act of 1877 giving express power is taken to be out of the Act for the present purpose. It is clear, therefore, to me that they must, under the implied powers of the Act (I suppose that is the proper way of considering it) be authorized to take land and to deal with it accordingly; that is, using the language of the Act, it shall be appropriated exclusively to the erection of buildings of a certain class. Inasmuch as they have not, as far as I can find out, any power themselves of applying the moneys raised by rates for the construction of such buildings, it can only be done

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by doing what the Act of 1877 contemplated should be done in the *Gray's Inn Road*, and what the Act of 1877 still contemplates should be done so far as it has not been done in carrying out the improvements in various other parts of the Metropolis to which the Act of 1877 still applies. It seems to me, therefore, that there is an implied power in the Board to do what they could have done under the 33rd section of the Act of 1877 under the express direction contained there.

Well, then, what are the purposes for which the repeal or the abolition of that section, so far as the *Gray's Inn Road* is concerned, takes effect? It is singular it says: "After the passing of this Act the provisions contained in sect. 33 shall cease to be in force." That looks rather as though it were intended to apply to the various provisoes that follow upon what I may call the enacting part; but I have great doubt whether that can be the meaning of it, because the language of the section is, "and in relation thereto the Act of 1877 shall be read as though the section were not contained therein." But it is unnecessary for me to deal with that; because although there are certain provisoes in the 33rd section as to which I see no reason why they should not continue to apply to what has to be done under the Act of 1882, it is not material for the present purpose, and therefore I say no more about them excepting that I do find the proviso in sect. 33, providing that not more than fifteen houses are to be taken until accommodation has been provided for such numbers of persons as would be displaced by such taking, is one which clearly created a great difficulty in the matter, and to remove which the Act of 1882 was intended to apply. Putting the best construction I can upon the Act, it seems to me that the obligation on the Board to appropriate the land coloured green to the erection of artizans' dwellings, is at least as strong under the Act of 1882 as it was under the Act of 1877. It must be carried out in the only way in which it can be done. It cannot be done by the Board erecting the buildings themselves; it can only be done by letting or selling to some person who is to do the same thing. It seems to me, therefore, to sum it up, that the power of letting or selling expressly contained in the 33rd section of the Act of 1877 is to be implied as still existing in the Board as regards the land referred to in the 2nd section of the Act of 1882.

If the Board could have built the houses I have referred to, any remedy the Plaintiffs might have for interference with their lights could not be maintained by getting an injunction to restrain the building, but must be obtained by compensation under the *Lands Clauses Act* under the section to which I have previously referred. It seems to me, therefore, that if the Board were doing it themselves, there could not be any injunction against the Board. Under the Act the Plaintiffs' right previously had been a right to an easement of light. The effect of the Act was to extinguish that right, and to convert it into a right to be compensated for the injury he has sustained by reason of that light being taken away.

Then if that is so, it is important next to consider what is the position of Mr. *Fryer*: whether there can be any injunction against the Defendant *Fryer*, who is now erecting the buildings.

[His Lordship stated the effect of the agreement between the Metropolitan Board of Works and *Pink* and the agreement between *Pink's* executors and the Defendant, and proceeded:—]

Now it appears to me that the persons who act for the Board are in the same position as if the Board themselves had been building. Assuming that this land had been taken for a railway, and that the promoters of the undertaking had entered into an agreement with contractors that they should construct the line and have a lease of the line and work the line when made, it seems to me that those persons would be in precisely the same position as the promoters of the undertaking as regards the relative rights of the vendors of the land whose land was taken from them by the promoters of the undertaking themselves. As the Metropolitan Board of Works cannot build themselves, and as they are entitled to let or sell for the purpose of building, the rights conferred by the Act upon them apply to persons to whom the land may pass for the purposes of the Act, and they must have the like privileges and freedom from obligations as the Board of Works would have had if they themselves had been erecting the buildings which are not only authorized but bound to be erected under the Act itself.

Then it is said that there is a difference in this case by reason of the clause in the two agreements to which I have referred—that the sale to Mr. *Pink* and the lease to Mr. *Fryer* are subject to existing easements. That does not appear to me to alter the case as regards the Plaintiffs. It would be depriving the Metropolitan Board of Works of the power which they are intended to have under the Act if they could limit their rights in that way by re-creating an obligation on land of this sort and attaching to it certain liabilities from which the Legislature intended it to be freed in passing the Act and authorizing them to acquire land for these purposes under the Act. It seems to me they could not set up again those easements and obligations from which the land is to be free for the statutory purposes for which it is to be taken. But it does not follow that those words are without meaning. They are matter of express bargain between the Metropolitan Board of Works and the purchasers from them; and again, as between *Pink's* executors and the lessee from them. Under those circumstances there may be certain rights arising out of those stipulations between the parties who make them and enter into them, wholly unimportant as regards the owners of the land, the persons who did have the easements, now at an end, to which the land was subject. I have formed an opinion about those words, but I do not intend to say anything on the subject, as I have only one of the parties interested before me. It is obvious that *Pink's* executors and the Metropolitan Board of Works may still have a great interest in the construction of those documents.

Then further it is said that what is being done leaves the Plaintiffs without remedy, because whatever right of compensation they might have had against the Metropolitan Board of Works under the Acts, if the Metropolitan Board of Works had taken the land, and had themselves proceeded to erect buildings, and blocked out the access of light from the Plaintiffs yet the Metropolitan Board of Works are not doing it, they have parted with all their interest, and they are doing nothing whatever of which the Plaintiffs can complain.

Now the right to compensation under the 68th section of the *Lands Clauses Act*, to take only the material words, is this: It is compensation "in respect of any lands which shall have been injuriously affected by the execution of the works." The works mean those for which the lands must have been taken under the Act, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of the Act. Therefore, as far as those words go, it appears to me that this is land which, if the Plaintiffs are right as to the obstruction of light (which I assume for the present purpose), is injuriously affected by the execution of the works. There is nothing limiting the obligation to make compensation during the execution of the works authorized by the Act pending the works done by the promoters of the undertaking themselves. As I have already pointed out, the promoters of a railway would be bound, so far as any act injuriously affecting neighbouring land is done by the contractors with whom they have entered into an obligation to make the line and to take a lease of it, corresponding *mutatis mutandis* with the provisions of the agreement in the present case.

It seems to me, therefore, that the contention that, by the Board's disposing of the property, the right against them has ceased, and that there can be no right against Mr. *Fryer* for compensation, and therefore there must be a right for an injunction, cannot be sustained. In the first place although the work has been done by the lessee, that of itself is not sufficient to exclude a right to compensation. In the next place this is to be borne in mind, which is a very important matter: the Metropolitan Board of Works are not mere passive agents in the matter. They have not got the land in lease; yet they have got it under an obligation and have recognised that obligation. They have insisted on that obligation being performed by the persons to whom they have sold the land, and they have taken express covenants and provisions that the land shall be dealt with exactly in the way in which it has been dealt with by the persons claiming to build thereon. They have reserved the power to re-enter in case the works are not performed in accordance with the proposed plans. It seems to me, therefore, that as between the Plaintiffs on the one hand and the Metropolitan Board of Works on the other, it cannot be said that all right to relief or all liability to give relief had passed away from the Metro-

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politan Board of Works to the persons who are the actual erectors of the building which causes the nuisance.

Then again it is to be borne in mind that the Plaintiffs were not consulted about or parties to the arrangements the Board made with respect to the land. It does not appear to me that the Board can have the power of depriving the Plaintiffs of any remedy the statute gives against them by any private arrangements that the Board make with the persons to whom they sell or lease for the purpose of carrying out the objects of the Act.

Under those circumstances, I am of opinion that what is being done here is in compliance with the Act, and that the Plaintiffs' remedy, if they are injured, should be by obtaining compensation and not by way of injunction.

Under these circumstances I simply refuse the motion.

Solicitors for the Plaintiffs: *Bowman & Crawley-Boevey.*
Solicitors for the Defendant : *Benbow, Saltwell, & Tryon.*

D. P.

In re JONES, A SOLICITOR.

STIRLING, J.
1887
March 17, 30;
April 4, 5;
May 7.

Bills of Costs—Common Order for Taxation obtained by Solicitor—Retainer.

Where a client obtains the common *ex parte* order for the taxation of a solicitor's bill of costs, he cannot dispute his retainer to the extent of the whole of the bill, though he may do so in respect of particular items in the bill, the practice being to require the client on his application for the order to make an admission of the retainer; but where a solicitor obtains the common *ex parte* order the client is not bound by the allegation of retainer contained in the petition, and consequently may object to every item in the bill on the ground of there having been no retainer.

Consequently it is no objection to the common order when obtained by a solicitor that he knew that the clients disputed his retainer as to the whole bill.

MOTION, placed, by arrangement, in the adjourned summons list, on behalf of the Commissioners of the reservoir at *Deanhead, Yorkshire*, a public body incorporated by statute (1 & 2 Vict. c. lxiv.) for the purpose of making and maintaining the reservoir; to discharge the common *ex parte* order obtained by Mr. *Frederick Robert Jones*, a solicitor at *Huddersfield*, for the taxation of his bills of costs. Mr. *Jones* was on the 23rd of October, 1839, appointed by a resolution of the Commissioners to be their clerk, nothing being said as to salary or remuneration, and he continued to act for them in that capacity down to March, 1886. In 1840 the Commissioners resolved to make an application to Parliament for further powers, and by the resolution passed on the 4th of November in that year, the clerk was directed to adopt all necessary preliminaries for that purpose, and as soon as a draft of the proposed Act was prepared to call a special meeting of the Commissioners. The Act was passed on the 22nd of June, 1841. It contained a clause authorizing the costs of obtaining it to be paid by the Commissioners out of any moneys in their hands, and after resolutions, which were passed in June and October, 1841, the Commissioners, on the 22nd of December, 1841, passed a resolution that in future the salary of the clerk should be £15 a year, the same to be in satisfaction for his services in giving notices for payment of rates in arrear, preparing cheques, keeping the books, preparing the annual accounts, and so forth; but it was not to include money out of pocket or law business arising out of the reservoir affairs, such as preparing conveyances or securities for moneys borrowed, prosecuting or defending actions or suits. A subsequent resolution raised the salary to £20 a year, but did not otherwise alter the terms of that of December, 1841. The employment of Mr. *Jones* continued on the footing of the resolution of December, 1841, down to the time when he ceased to be their clerk. During the years from 1839 to 1886, Mr. *Jones* from time to time acted as solicitor for the Commissioners, and he was paid by them the amounts of various bills of costs in addition to the remuneration which they paid him for his services as their clerk. Previously to the 26th of October, 1886, Mr. *Jones* sent to the Commissioners bills of costs which contained various matters of business transacted by him professionally for them between the years 1883 and 1886. One matter of business was that in 1885 the Commissioners entered into a negotiation for the sale of their reservoir to the corporation of *Oldham*, and on the 4th of August in that year they passed a resolution that the offer made by that corporation to purchase be accepted upon certain conditions: one being that an Act of Parliament to carry the sale into effect would have to be applied for. A resolution was on the 11th of August, 1885, passed by the Commissioners for that purpose, and a Bill was introduced into Parliament, but it did not become law.

On the 26th of October, 1886, Mr. *Marshall*, the clerk of the Commissioners at that time, returned to Mr. *Jones* the bills of costs with a letter to the effect that they had been laid before the Commissioners, and that he was instructed to say that they repudiated the liability to pay the bills, with the exception of a few items, on the ground that part of the business in respect of which the charges were made were unauthorized by them, and part of it was transacted by Mr. *Jones* as their clerk. He asked for bills of the excepted items, with the vouchers, and said that he would obtain the sanction of the Commissioners for their payment. On the 11th of November, 1886, Mr. *Jones* again sent the bills to the Commissioners, and they were again returned to him by Mr. *Marshall*. On the 13th of December, 1886, Mr. *Jones* obtained the common *ex parte* order for taxation which it was now sought to discharge.

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Ingle Joyce, for the Commissioners:—

The common *ex parte* order for taxation was improperly obtained. Mr. *Jones* knew that the charges which he made would be disputed, as the bills were sent back to him before he obtained the order, and he ought not to have applied for it. His authority, if any, for making these charges, must be found in the resolution of the Commissioners; but he had none for doing many things for which charges are made. The bills may contain a few items which are properly charged for, and as regards them the Commissioners will be prepared to pay. As to all the rest—the main charges—those in reference to the winding-up of the concern, the application as to a receiver, and others, they are not liable at all, as there was no resolution authorizing him to act at all in those matters. The resolution, or something like one, in reference to the sale of the property to the corporation of *Oldham* was *ultrà vires* and void. Mr. *Jones* knew it was not a proper resolution, and the Commissioners decline to pay anything in connection with it. The application for an order for taxation ought to have been to the Court, and then all parties could have been heard upon it before any order was made: *In re Pyne* (1); *In re Thurgood* (2). A question of retainer cannot be raised on a common *ex parte* order for taxation as to the whole of a bill of costs: *In re Herbert* (3); *In re Bracey* (4).

W. Baker, for Mr. *Jones*:—

The letter of the clerk of October, 1886, did not positively repudiate the retainer, and the Taxing Master can decide what ought to be done. The appointment of a solicitor to be the clerk of the Commissioners by the resolution of December, 1841, was quite sufficient to enable him to act as solicitor, and to justify him in making these charges. The conveyancing, transfer of mortgages, and paying off mortgagees; sending notices to them; summoning special meetings of Commissioners; the prosecution of actions against parties for rates in arrear, and other matters, was all proper business to be done, and which had to be done by somebody. Mr. *Jones* had acted for the Commissioners, and had done all their law business for over forty-six years. He had from time to time been paid his charges, and he acted rightly in sending in the bills now disputed. The case of *In re Bracey* (1) shews that the client must admit a retainer as to part of the bill of costs before he can obtain the common *ex parte* order for taxation, and that there must be a special application to the Court for an order where the retainer is denied for all the bill, but the same practice does not apply where a solicitor makes an application for an *ex parte* order: *Re Flower* (2).

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(1) 5 C. B. 407.
(2) 2 W. R. 682; 19 Beav. 541.
(3) 34 Ch. D. 504.
(4) 8 Beav. 266.

Ingle Joyce, in reply, referred to the case of *In re Inderwick* (3).

1887. May 7. STIRLING, J. (after stating the facts, continued):—

It thus appears that at the time when the order was obtained a dispute had arisen between the Commissioners and Mr. *Jones* as to the liability of the former in respect of the bills.

The Commissioners contended that, as regarded part of the items, the business charged for was not authorized by them, and that the remainder represented disbursements made by Mr. *Jones* as their clerk, and not as their solicitor.

It was submitted on their behalf that, as to the former class of items, the Commissioners are not liable, and as to the latter that, although they are liable, they are not proper to be included in a solicitor's bill of costs.

Now the common order for taxation ought not to be applied for in a case where the effect of it is to settle an existing dispute in favour of the party obtaining it, and to preclude his opponent from raising the question he desires to raise; in any such case a special application for the order ought to be made, so that the

(1) 8 Beav. 266.

(2) 19 W. R. 578.

(3) 25 Ch. D. 279.

point in dispute may be submitted to the Court and decided after both parties have been heard. If, then, the effect of the order of the 13th of December, 1886, was to prevent the Commissioners from objecting, before the Taxing Master, to every item of the bills on one or other of the grounds which I have mentioned, the order was improperly obtained, and ought to be discharged.

Now it has been decided in the case of *In re Herbert* (1), and the authorities there referred to, that where a client obtained the common order to tax a solicitor's bill, he could not dispute the retainer as to the whole bill, though he might do so as to any particular items or any head of charges.

If the client desire to dispute the retainer as to the whole bill, the cases of *In re Pyne* (2) and *In re Thurgood* (3) shew that he ought to obtain a special order giving him leave so to do. It was contended, however, that that is not the case where the solicitor obtains the order, and in support of that contention the case of *Re Flower* (4) was cited. In that case a person had given authority for the use of his name as next friend for an infant in a certain litigation. The infant's solicitor applied to him for payment of the costs, when the next friend disputed his liability. On a motion to discharge the common order to tax obtained by the solicitor, Lord *Romilly* said that the Taxing Master could go into the question of retainer; but he added that for the mere purposes of taxation the client was not at liberty to dispute the validity of his signature as next friend to the authority for bringing the action, but must institute some independent proceedings; and that the solicitor who got the common order to tax, under such circumstances, was not obliged to mention that the next friend disputed his liability. The case, consequently, was decided on special grounds, and affords little assistance in the decision of the present case. Nor have I been able to find any authority precisely in point. It becomes necessary, therefore, to consider what is the reason for the rule that a client who has obtained an order to tax may not dispute his retainer as regards the whole bill. Now, on referring to *In*

(1) 34 Ch. D. 504.
(2) 5 C. B. 407.
(3) 19 Beav. 541.
(4) 19 W. R. 578.

re Bracey (1), cited in *In re Herbert* (2), I find the rule thus laid down: "The party prosecuting the common order for taxation, may object, on the ground of want of retainer, to any items of the bill, except those for which he has admitted the retainer by his petition." That, I think, is the strict form of the rule, and shews it to be founded on the admission of retainer, which the practice of the Court requires the client to make for the purpose of obtaining the common order. It would be inconsistent with that admission if the client disputed every item of the bill, and consequently he is not allowed to do so. But where the solicitor obtains the order, although he must in his petition allege a retainer, the client is in no way bound by that allegation, and cannot be charged with inconsistency if he disputes it. It appears to me, therefore, that the reason for the rule fails, and consequently, that where the solicitor obtains the order the client may object to every item on the ground of want of retainer. I have reason to believe that the practice of the Taxing Masters is in accordance with the view which I have just expressed. I am of opinion, therefore, that in the present case the common order was not improper, and ought to stand.

In the course of the argument various points arose on the bills and were discussed at some length, and it was agreed between the parties that I should express my opinion on such of them as might appear to be ripe for decision. It was contended that the appointment of Mr. *Jones* as clerk was a retainer of him as the Commissioners' solicitor. The material facts as to his appointment are that by the statute passed in 1838 the Commissioners were authorized, by sect. 5, to appoint a treasurer, collector, and clerk, and such other officers as they should think proper. [His Lordship then referred to the resolutions of the Commissioners of October, 1839, and subsequent years, down to that of the 22nd of December, 1841, and continued:—] Assuming that the resolution of October, 1839, was a retainer of Mr. *Jones* as a solicitor, I am of opinion that by the resolution of the 22nd of December, 1841, his position was entirely altered. From that date he became in my judgment simply an officer of the Commissioners at a yearly salary, with the expectation, no doubt, on both sides that he would be employed to transact such legal business as the Commissioners might from time to time properly require, but without any retainer until the occasion arose for the transaction of such business and the Commissioners saw fit to employ him therein. On that point the case of *Bush* v. *Martin* (1) seems to be an authority.

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(1) 8 Beav. 266, 268.

(2) 34 Ch. D. 504.

I am, therefore, of opinion that the appointment of Mr. *Jones* as clerk of the Commissioners was not of itself a retainer by them of him as their solicitor during the period over which these bills extend.

[His Lordship then referred to the negotiations for the sale of the reservoir, and continued:—] A very considerable number of the items in the bills of costs which are objected to relate to the proposed sale, and to business done in pursuance of the resolution of the 11th of August, 1885. It was contended that those items must be disallowed on the ground that the proposed sale was beyond the powers of the Commissioners, and that they could not employ the funds in their hands for the purpose of promoting a bill in Parliament which would enable them to effect a sale, and I am of opinion that that is so.

The Commissioners had no power to make an arrangement which involved the transfer of their undertaking to the corporation of *Oldham*, and the promotion of a bill in Parliament for that purpose. I am therefore prepared to express an opinion: first, that under the order of the 13th of December, 1886, the Commissioners are at liberty to object to every item in the bills, on the ground of want of retainer or otherwise; secondly, that the appointment of Mr. *Jones* as clerk of the Commissioners was not of itself a retainer by them of him as their solicitor during the period over which the bills extended; and thirdly, that it was beyond the powers of the Commissioners to employ the funds in their hands in carrying into effect the arrangement purported to be sanctioned by their resolution of the 11th of August, 1885, and that all items charged in the bills for business transacted in pursuance of that resolution ought to be disallowed, and I direct

(1) 2 H. & C. 311.

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the Taxing Master to have regard to such expressions of my opinion in proceeding with the matter under the order of the 13th of December, 1886. As regards all matters not covered by the last two expressions of my opinion, I think that they ought to be inquired into by the Taxing Master. Mr. *Jones* must have his costs of the application.

Solicitors: *Gregory, Rowcliffes & Co.*, agents for *F. R. Jones, Huddersfield; Burn & Berridge.*

T. F. M.

RUST *v.* VICTORIA GRAVING DOCK COMPANY, AND LONDON AND ST. KATHARINE DOCK COMPANY.

[1881. R. 206.]

C. A.
1886
CHITTY, J.
July 19.
C. A.
1887
Feb. 4, 5, 7, 8, 14, 15, 23.

Damages—Injury to Property by Flood—Injury to Reversion.

Owing to the negligence of the Defendants a building estate belonging to the Plaintiff was overflowed by a flood. Part of the land was covered with houses (A) which were in the Plaintiff's possession. Another part was covered with houses (B) erected by builders under building leases. Other parts were the subject of building agreements under which houses (C) were in course of erection, and the Plaintiff was bound to make and had made advances to the builders on the security of the property. The remainder of the land (D) was vacant, and in the Plaintiff's possession. The amount of damages to which the Plaintiff was entitled was referred to a special referee. In respect of (A) the referee allowed as damages (1) the expense of repairing the houses, and the rent during the period of repairs; (2) the loss arising from reduced rental for four years in consequence of the prejudice against the neighbourhood caused by the flood. As to (B), he found that there was no injury which would last to the end of the leases, but he allowed a sum for depreciation of the selling value of the landlord's interest, in consequence of the houses being worth less to let. As to (C), he deducted the value of the houses when repaired and completed, less the expense of repairing and completing them, from the amount advanced, and awarded this difference to the Plaintiff for depreciation of mortgage securities. As to (D), he gave three months of an estimated rent for delay in letting. *Chitty*, J., refused to disturb the report:—

Held, on appeal that (A) (2) must be disallowed, for that loss of rental arising from the prejudice against the neighbourhood caused by the flood was not the natural result of or directly caused by the flood, and was not a legitimate ground for giving damages:

Held, that the sum allowed in respect of (B) must also be disallowed, for that a reversioner can only recover damages where the injury to the property is permanent, so that it will continue to affect it when the reversioner comes into possession, and he is not entitled to damages in respect of a temporary injury, on the ground that it affects the present saleable value of his reversion:

Held, that the sum given for depreciation of mortgage securities (C) must be disallowed, and an inquiry directed with a view of ascertaining to what extent the flood had made those houses a less sufficient security for the plaintiff's advances than they were before.

THE Plaintiff was the owner of two freehold properties at *Silvertown*, in *Essex*, containing about twelve acres. In 1881 about two

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and a half acres were covered with buildings, some of which belonged to the Plaintiff, but as to the rest he was entitled to ground rents and to the reversion after a term of about ninety-six years. Upon about three and a half acres building operations were going on under building agreements with certain builders, to whom the Plaintiff, by the terms of the agreements, was bound to make advances from time to time on the security of the building materials and of the buildings when completed. About six and a half acres were vacant.

In January, 1881, the water of a high tide flowed through the docks of the Defendant companies and flooded the Plaintiff's land. The Plaintiff brought this action for damages on the ground that the flooding arose from the Defendant companies having disregarded their obligation to provide a wall of a certain height to protect the land, and for an injunction to restrain them from leaving their docks and channels unprotected by sufficient walls.

The companies denied their liability, but on the 8th of August, 1882, judgment was given, granting a perpetual injunction to restrain the Defendant companies from allowing their walls to be of lower level than five feet above Trinity high-water mark, and declaring the Defendants to be "liable to pay to the Plaintiff such damages (if any) as may have been sustained by him by reason of the flooding of the Plaintiff's building estates, as in the pleadings mentioned." An inquiry was directed what damages had been sustained by the Plaintiff by reason of the flooding.

On the 23rd of February, 1885, it was by consent ordered that the questions arising in the action should be referred to *E. N. Clifton*, as special referee, to inquire and report, pursuant to the *Judicature Act*, 1873, s. 56, and to the judgment of the 8th of August, 1882, what damages had been sustained by the Plaintiff by reason of the flooding of his building estates in the pleadings mentioned.

On the 4th of March, 1886, Mr. *Clifton* made his report, finding that the damages amounted to £1941. By direction of Mr. Justice *Chitty*, he, on the 9th of June, 1886, made a supplemental report, giving the particulars of his assessment as follows :—

	£	£	£
Charles Street, 12 houses repaired	—	171	—
As in *Rust's* possession, 6 months allowed for works to these houses and letting.			
Rent at 8*s*. per week each house for 6 months, £10 8*s*. × 12, say	125	—	—
Four houses, delay in letting, say 20 weeks at 8*s*. per week each, £8 × 4	32	157	—
		328	
Depreciation to these houses by reductions of rentals 2*s*. per week on each house, £5 4*s*. By 16 houses, say £83 per annum. Allow for a period of four years	—	332	—
			660

Depreciation in Ground Rents through Houses letting at less Value.

	£	s.	£	s.	£
Arthur Street,					
Nos. 25 to 47 odd, 12 houses at £3 16*s*. each	45	12			
Arthur Terrace,					
Nos. 5 to 8, 4 houses at £4 10*s*. each ..	18	0			
Arthur Street,					
Nos. 2 to 48 even, 24 houses at £3 16*s*. each	91	4			
Charles Street,					
Nos. 1 to 27 odd, 14 houses at £3 10*s*. each	49	0			
Nos. 2 to 38 even, 19 houses at £3 10*s*. each	66	10			
George Street,					
Nos. 1 to 7 odd Nos. 2 to 14 even } 16 houses at £3 15*s*. each	60	0			
			330	6	
Allow year's purchase ..			1		
			say		330

Depreciation of Mortgage Securities.

	£	£	£
Arthur Street,			
Nos. 25 to 47 odd, 12 houses amount advanced ..	1120		
Nos. 26 to 48 even, 12 do. do. ..	960		
		2080	
When put in repair and completed will be worth:			
Nos. 25 to 47 odd, 12 houses at £90 each	1080		
Nos. 26 to 48 even, 12 do. £100 „	1200		
	2280		
Deduct cost of repairs	700		
		1580	
		500	
George Street,			
Nos. 10 to 24 even, 8 houses, amount advanced ..	440		
Less value of carcase, 8 at £30 ..	240		
		200	
			700

			£	£
		Brought forward		1690
	DELAY IN LETTING VACANT LAND.			
Oriental Road,	665 feet frontage, at 5*s.* 6*d.* per ft., £182 17*s.* for half a year		91	
Charles Street,	235 do.			
George Street,	511 do.			
James Street, (partly formed.)	762 do.			
Graving Dock Road,	395 do.			
	1903 do. at 5*s.* 6*d.* per foot	523		
North Woolwich Rd.,	357 do. at 6*s.* 6*d.* ,, ...	116		
		639		
	Allow 3 months		160	
				251
				1941

The Plaintiff moved before Mr. Justice *Chitty*, on the 19th of July, 1886, to have this report affirmed, and the Defendants to have it varied.

Ince, Q.C., and *Ashton Cross*, for the Plaintiff.

Jeune, for the *Victoria Dock Company*.

Nicoll, for the *St. Katharine Dock Company*.

CHITTY, J.:—

This case has been very fully and ably argued, and particularly by Mr. *Jeune*, who has had the more difficult task in the argument of the two; but I believe now, after having heard him reply, that I fully understand the drift and course of his argument.

It is necessary to make a short statement in order to explain the points which I have to decide. Mr. *Rust* was the owner of some twelve or thirteen acres of building land near the *Victoria Graving Dock*, and a flood occurred in January, 1881. This is an action brought by Mr. *Rust* against the *Victoria Graving Dock Company*. Judgment has gone in favour of the Plaintiff, with an inquiry to ascertain what damages he has sustained. The parties selected, and, I think, rightly, in a case of this kind, a referee, to ascertain the damages, rather than take the matter before the Chief Clerk at chambers, or the Judge in chambers, and they selected a gentleman of skill, experience, and general knowledge in these matters, and I may say that, having seen Mr. *Clifton* on several occasions, I have no doubt that he is a man thoroughly competent, as far as all questions of fact are concerned, to deal with the subject matter that was referred to him. I should hardly make this observation in an ordinary case, but I make it now because one or two suggestions that have been made appear to me to impute to Mr. *Clifton* some ignorance of matters in which he is highly skilled. For instance, it has been suggested that in some part of his report he intended to state two alternatives, and then that he has added up the amount which he has given in respect of each alternative and made it part of the total sum; but I am satisfied that Mr. *Clifton* could not possibly fall into such an error as that—at least, it would seem improbable that he could fall into such an error as that. After he had made his report, he was asked to answer a certain set of interrogatories, which were administered to him by the Plaintiff and by the Defendants, and he has also made an additional report to me; and I cannot find the slightest trace of any such error as that which I have just mentioned, and I think I should be doing him wrong even to entertain the question. Had there been any such suggestion it would have been put in one of the elaborate series of questions that have been addressed to him, and he would have given a plain answer to it.

Now, the land which I have mentioned was what is commonly termed building land, and was let out in parts to different builders—one part to one and one part to another. *Ladd* was one of those who had a building agreement, and *Nicholls* was another; and there were some others whose names it is not necessary to mention. Besides that, there was some land which was vacant land—that is to say, not comprised in any building agreement whatever, and, as to the property comprised in the building agreements, the building had advanced to various stages. In some cases the houses were in carcase, and some were advancing to completion. In some cases houses had been completed and leases granted. The property, therefore, with regard to the buildings upon it, was in various stages, which one might expect it would be where there were building agreements not yet carried fully into execution.

It was agreed between counsel that the building agreements were in a similar form. Each of them contained a clause with reference to the interest of the builder under the agreement. It is a clause quite usual, and it is to this effect—that notwithstanding anything contained in the agreement, the agreement was not to be deemed to operate as a present demise of the property, or to give to the builder any legal estate or any interest therein whatever.

With those few observations, I will go to the particular points that were raised. The first refers to twelve houses in *Charles Street*, and the referee says that he has allowed the damage done by the flood to those houses upon the footing of their being in the Plaintiff's possession. Upon that Mr. *Jeune* has argued that the referee has fallen into an error, and that he ought to have found the damages on the footing of *Ladd* being in possession. These twelve houses were the twelve houses comprised in *Ladd's* agreement.

I have given the date when the flood occurred, which was in January, 1881; but previously to that, namely, in January, 1880, Mr. *Rust* had given notice to *Ladd* terminating the agreement. There is a clause, which I need not read at length, which operates where default has been made, terminating the agreement upon the notice or within a few days after. Proceedings have taken place between Mr. *Rust* and Mr. *Ladd*, which have resulted in this, that Mr. *Rust* has recovered possession, which he did on the 14th of June, 1881; and he has had awarded to him damages. The clause in the agreement to which I refer is of the usual character, and enables the landowner—that is, in this case, Mr. *Rust*—to recover on the agreement damages up to the time of its determination; that is to say, it is a mere case of determining the agreement, and not a case of rescinding it *ab initio*. The result of the legal proceedings between Mr. *Rust* and *Ladd* established the fact beyond all question that Mr. *Rust* was entitled to possession within a few days after the 20th of January, 1881. Consequently Mr. *Rust* was entitled to possession at the time when this flood occurred.

Now the main argument that I have heard from Mr. *Jeune* with regard to this point, which I call No. 1 (that is *Charles Street*, in Mr. *Rust's* possession), is, that these damages were *Ladd's*. I am not satisfied that they were not. It is hardly necessary to refer to any authorities on the matter, but I mention *Twyman* v. *Knowles* (1) to shew that *Ladd* could not have recovered any damages, even although he legally held possession at the time. He had some possession, although there was no demise. *Ladd*, or some other builder, has brought some action which I am not called upon exactly to decide; but he had no interest which would have enabled him to sustain any substantial claim for damages. *Twyman* v. *Knowles* shews that in order to recover substantial damages the Plaintiff must shew that he has an interest beyond an interest for a day or two; and all *Twyman* could, on the facts, shew to the jury was, that he was in possession at the time, and under the circumstances it seemed probable, and by non-production of certain documents it was fair to infer, that his interest would determine a few days afterwards. That principle applies strongly to this case; because *Ladd* had, as between himself and Mr. *Rust*, no interest whatever at the time when this flood occurred.

I therefore hold that the referee was right in finding damages under this head upon the footing of Mr. *Rust* being in possession.

That disposes of the £328, portion of the £660, which is the total amount awarded in respect of those houses, and his interest in those houses.

Then there is £332 which the referee allows, and which makes up a balance of £660 for depreciation of these houses by reduction of rentals at 2*s*. a week on each house for sixteen houses—say £83 per annum allowance for a period of four years, £332; and he finds that the letting value of those houses, which, as was admitted at the Bar, were houses of a comparatively poor character, owing to being let at small weekly rentals—so many shillings a week—he has found there was this damage actually sustained, and sustained by Mr. *Rust*. It was suggested in regard to this head that the referee was making an allowance for loss arising from apprehension of future damage, that is to say, a

(1) 13 C. B. 222.

recurrence of the flood, and that that fear would operate upon the minds of his tenants or intending tenants and keep them away. Consequently it was said that this was damage for apprehended injury in the future. But Mr. *Clifton*, in his answer (which I need not read) to the question put to him, has negatived that substantially and clearly. I think that he was justified in saying Mr. *Rust* being in possession, that the flood has caused a loss to him for which he is entitled to compensation to the extent of £332, because these houses will not let and do not let. He has allowed a period of four years. He has not taken any excessive time, and it seems to me that the letting value of the houses has been damaged to that extent and for that period; these are Mr. *Rust's* damages and the damages of no one else.

Then the next head, which I will call No. 2, is that in respect of which he has found damages to the amount of £330, and that comes under the head of depreciation in ground rents through the houses letting at less value. Now, with regard to the houses that are included under this head, they were in various stages: some had been completed and leases granted, others were in different stages, and they do include, as to some of them, some of the houses in respect of which the £660 was found. But I think that counsel has substantially acted upon what I am about to state, at any rate, knowing what a skilled man Mr. *Clifton* is, I think this is a fair explanation with reference to an objection that was raised by Mr. *Jeune.* What was said was, that he had given damages twice over. This is a case of alternative damage again. Mr. *Clifton* is a skilled man as to this, and he has separated, for the purpose of his report, the interest which Mr. *Rust* had into two parts, and when he has given these damages under the head which I have called No. 1, *Charles Street*, as in Mr. *Rust's* possession, he has given them in respect of Mr. *Rust's* possession and not in respect of his right to ground rents.

The ground rents were being created, of course, under the agreement, and this is not land for which a man has any love. It is not a place where a landowner intends to pass his life. The whole object of these building agreements, particularly as to houses of this class, is, really to turn the thing into money, and by degrees, by putting the houses on the ground, to create ground rents—to create leases, and then sell the ground rents and get rid of them. It is not a property which any man has any special affection for; and really, when the thing is fairly considered, having regard to matters of this kind, the parties are treating the land much more as a merchantable commodity than they are treating it in the way in which land is treated according to strict law. It appears to me that all that Mr. *Clifton* has done is this—when he has included some of the houses under both these heads he has included them in respect of a different interest, and nothing more. I think, therefore, that that objection falls to the ground.

Now comes the general point as to whether Mr. *Rust* is entitled to recover anything in respect of the ground rents. I have already shewn that some of these were actual ground rents—that is to say, leases were granted, and consequently as to those Mr. *Rust* was the reversioner. As to others, the rents had not been created, because the houses had not been finally completed; but some were very nearly completed, and then with regard to them, he was still legally the owner of the land, and as such entitled to sue for damages. As to those, I will say that he was under the qualified or conditional equitable obligation which might or might not ripen into an absolute equitable obligation, to grant leases—that is to say, the obligation pledged him to this according to the event whether the builders did or did not perform the agreements. If I am to look upon him as a reversioner simply, which he is not in law, because he is the owner, subject only to this equitable obligation; but if I were to look upon him as a reversioner in law, as indeed he is, with reference to those few cases where the leases have been granted, it is argued that he can only recover damages for the injury to the reversion. This is perfectly true as a general proposition, and that proposition would apply to such only of these houses as were included in the leases already granted. But the referee has found as a matter of fact, as I read his report and his answers, that the owner of the reversion has suffered damage to this extent. Mr. *Jeune* says it cannot be legal damage—that it is not damage which the law can take any cognizance of at all.

Now what is the test? Of course, in those cases where there is a nuisance of a temporary character, the reversioner cannot recover. Why? Because there is no injury to the reversion, and, there being no injury in law to the reversion, there cannot be any damage; but, where there is an injury to the reversion, the reversioner is entitled to recover damages, according to the measure which I will mention in a moment. In this case, there clearly was that which amounted to an injury to the reversion—I mean that the facts justified the referee in finding that the reversion was injured.

I will now state the reasons. If there is a temporary nuisance, no one can say that there is any injury to the reversioner; but when you come to a physical injury to the structure of a house in which a man has a reversion, or any property which is not quite a house, but has some buildings upon it, that is quite another thing. No man can say off-hand that there is not an injury to the reversion. It may be so slight that a jury or a skilled man like Mr. *Clifton* would say there is no injury whatever, and that there should be no damage; but here is a flood. Mr. *Jeune* argued this point with great cleverness; but he never brought this point out strongly, which I must put against him, namely, the physical injury to the structure itself; and as a skilled man has reported upon the matter to me, I think it is a case in which it is impossible to say that the law would off-hand declare there can be no damages, because there is no injury to the reversion. On the contrary, I think there is ample ground for saying that the flood has injured the houses to an extent which will justify a jury, or a skilled man acting as a jury, in saying that the reversion itself has been injured; and that is all in regard to this head that Mr. *Clifton* has done. He says there is an actual depreciation in the ground rents (I put in the word "actual," because that is what he means), through the houses letting at less value.

Consider what the nature of the property is. That is a general observation which would apply to all, whether they are leased or not. They are houses let, as I have said before, at weekly rentals; and the result is, the security of the landlord who owns the reversions on the leases is injured by the houses not being properly completed, and as a matter of fact, as I understand and as I read Mr. *Clifton's* answer in his report, he has found that this damage was sustained by the reversioner. He does not talk about reversions. He is dealing with the facts before him, and with knowledge of what the interest of Mr. *Rust* was, and I think, therefore, he was justified in allowing this moderate sum of £330 for one year on the value of the rentals. This, really, is on the footing that the selling value of the reversion has been injured, because this is the case of the reversioner. I am assuming in favour of the dock company that I ought to treat Mr. *Rust* as reversioner in respect of all these houses.

It was laid down, as long ago as 1848, in the case of *Hosking* v. *Phillips* (1), that the proper measure is at how much less the premises would sell in consequence of the wrongful act of the defendants, and the reversion, it is expressly stated, is rendered less valuable, because instead of houses and land the plaintiff would have the land alone without the houses. That is the selling value according to the decision of the Court of Exchequer, and the loss in the selling value is the proper measure of damage.

Then there is the case of *Whitham* v. *Kershaw* (2), which was before the Court of Appeal. I will not go through the facts of the case. Lord *Esher* said that the value of the reversion might be diminished, but the question of how much injured would be a question of value, and the proper way to ascertain the damage would be to ask skilled valuers to say how much the property has been diminished in value. Those authorities are quite sufficient, I think, as a matter of law, to justify Mr. *Clifton* in what he has done.

Then I come to what I will call the third head, and that is—depreciation of mortgage securities. Mr. *Clifton's* second report to me, I think, sufficiently shews the facts. I have been at some little difficulty to ascertain, and I am not quite sure that I have ascertained the facts wholly with reference to this part of the report. Here and there a passage of the evidence has been read, but I have not searched the evidence in such a manner as to be able to say that Mr. *Clifton* has made any error, and as I go through this I will deal with the question of some error imputed to Mr. *Clifton*, which I do not think he would fall into. I think the evidence ought to have been put before me in such a way

(1) 3 Ex. 168.

(2) 16 Q. B. D. 613.

that I could form an opinion about it for myself. I decline, from the reading of a mere isolated passage, to come to the conclusion, unless the parties are agreed, that that is the whole of the evidence about the matter. I heard Mr. *Jeune* make statements, and I heard Mr. *Cross* make statements, and I need not say that I gave credit to each gentleman for the utmost candour; but I must say that those statements are not reconcilable with reference to the point on this part of the case. Counsel having gone through a very intricate matter such as this, I think it is surprising, I must say, in favour of Mr. *Cross* and of Mr. *Jeune*, that they agreed so much as they did, seeing the difficulties and perplexities of the case in its detail. This third head is the depreciation of the mortgage securities as I have said. Let me here state that Mr. *Rust*, being the owner in fee simple in possession of the property included under this head, subject only to a building agreement, the nature of which I have described, which *Nicholls* has taken from him, is the person claiming this. There is no legal title in Mr. *Nicholls* except such title as he may have had by the bare possession of the land, coupled with an equitable interest under the building agreement—one which might ripen into a full right to have a lease, or one which might, according to an event which is not unknown, ripen into nothing whatever, except a liability to pay damages for not having completed. I cannot make out whether Mr. *Nicholls* was shewn to be solvent or insolvent; but I am satisfied, as I have said more than once, that Mr. *Clifton* is not a man to make a report in a matter of this kind and not take a matter of this kind into consideration. I think it is incredible that he would not have done so. I will read what he tells me in the supplemental or additional report. [His Lordship read the report.] That means that Mr. *Rust*, the owner of the land, had made advances to *Nicholls* upon the usual terms that they were to be charges upon *Nicholls's* interest under the building agreement, whatever it might be, and the interest reserved upon these advances was £6 per cent. I say that to shew there was nothing special in *Nicholls's* pecuniary position as a builder. He seemed to be like one of the ordinary builders, who not having the money himself to fulfil his contract, instead of going to a banker or somebody else and borrowing the money, perhaps, on more extravagant terms than these, borrows from the landlord himself, and borrows at the not immoderate interest, but still at the not inconsiderable interest of £6 per cent. That shews £2080 had been advanced by Mr. *Rust* to Mr. *Nicholls*, and I think, as well as I can gather the facts (and Mr. *Cross* has told me so), that those advances were made upon certificates. Therefore the money, to that amount at least, must have got into the property. I say "at least," because I have not examined this agreement; but the certificates seem to shew the amount actually expended. Some margin of £10 or £20 per cent. is generally allowed. Then, having found the amount advanced by Mr. *Rust*, the referee goes on to say: "When put in repair" (that means when these houses were put into repair) "and completed, will be worth"—and then he gives the value—£90 some of the houses and £100 the others, and, adding it up, he makes a total of £2280, which is a margin of £10 per cent. over and above the advances. I understand, therefore, this part of the report to mean that there is the security which Mr. *Rust* stipulated for. I understand it also to mean that he had got security, to the extent of £2080 at least, at the time when this flood occurred.

Then Mr. *Clifton* has deducted from the £2280 what he calls "cost of repairs." Now I was asked to send back the report of Mr. *Clifton* for the purpose of ascertaining what he means by "cost of repairs." I understand from this part of the report that he is contrasting repairs with completion. He was asked a question with reference to this £700, and his answer is, "I estimate the depreciation in value of the Plaintiff's mortgage securities at the sum of £700." I think I must take it he means what he says—£700, notwithstanding some fragments of evidence that I heard that the referee means that it was the cost of repairs—repairs rendered necessary by this flood. He has not here charged as against the Defendant the whole of the £700; but what he has done is this: he has deducted the £700 from the £2280, and has brought out a sum of £1580, and then allowed, not £700 as the damages, but £500, because that is the sum by which the advances exceed the value of the property. Therefore I think that, as a matter of law, Mr. *Rust* is entitled to those

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damages; and again I refer to his position. He is the legal owner in fee, subject to equitable rights. I am not for a moment saying what right *Nicholls* may or may not have; but I think Mr. *Rust* is entitled to recover damages, because he had stipulated for a security which would have left him a £10 per cent. margin; he has now got a security which, by reason of the wrongful act of the Defendants, is only worth £1580; and the difference of margin appears to me to be his damage. I think, therefore, as I have said, that the referee must have given due weight to the position of the mortgagee. I cannot conceive it could have been seriously contended before him that *Nicholls*, the mortgagor, could pay, and that therefore there could be no loss. I must give some credit to Mr. *Clifton*, and it appears to me that he is right in this respect. Why should not the owner of the land, who has entered into an equitable obligation which may not ripen into anything at all, and is partly in possession under a building agreement, be able to recover the loss he has sustained by the depreciation of his security, he himself filling a sort of double capacity as owner of the land in law, but having equitable charges upon it—that is to say, having charges upon an interest granted by him under an equitable title to the builder? I decline to call him tenant. I noticed that Mr. *Jeune*, throughout his argument, styled *Nicholls* a tenant; but he is not a tenant. It is not necessary to say more than this: he is the man entitled to possession, as long as he can perform that agreement, and has no legal estate or interest whatever therein except according to the agreement.

I think, therefore, that inasmuch as Mr. *Rust* has had, by the wrongful acts of the Defendant, his security diminished to the extent of £500 below his advances, he is entitled to recover. It is not necessary to consider whether the referee might have given £700. Where a man stipulates for security of a certain kind, when it is diminished below that there might be reasons for saying the whole of the loss upon the security should be recovered. I might add, I think, the referee is right here, because I think the loss to Mr. *Rust* in respect of that will only be £500.

The £700 referred to by Mr. *Clifton* in his answers probably does not mean the cost of the repairs, but means the £500 *plus* the £200, which comes to £700. The sum of £200 stands on a similar footing in all respects as the £500. I correct what I have said before by saying that I understand Mr. *Clifton* really to be referring to the £700 in the second, and not the first, in his answers.

Then the last head appears to me not to require much discussion. It is delay in letting vacant land. Three months is allowed for this. This is not speculative. There was a flood and there was a delay, and the referee finds in the letting of the land attributable to that cause delay for three months. The damage as to that is not proved to be too remote. It must be remembered that the letting of the Plaintiff's land was the use that he was putting the land to. It was not that he desired to occupy it himself. This is what is commonly termed building-land, and the referee finds that there was a loss sustained by reason of his being unable to let it for a period of three months, arising, as I think, directly out of the flood. It appears to me that he is right upon that point; and in the result I think he is right altogether.

G. M.

The Defendants appealed from this decision, and the appeal was argued on the 4th, 5th, 7th, and 8th of February, 1887.

Jeune, for the Appellants:—

The difficulty here has been to keep the damages within the rule that damages can only be given for what is the natural result of, or directly occasioned by the wrongful act or omission. It is also necessary to guard against giving damages to the parties damnified in respect of their partial interests to an amount exceeding in the whole the total damage done. The total of damages must be the sum which an owner in fee in possession could recover, and that has to be divided among the several parties. I contend that the £332 in respect of the *Charles Street* houses must be disallowed. It appears to have been allowed because, after this flood, people may be shy of taking houses in this neighbourhood, and rents may consequently fall. That is not damage directly occasioned by the flood. People may not have noticed that this land lay below the level of the dock—the

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flood would call their attention to that, and rents might fall in consequence; but that is too remote. All that can be recovered in respect of these houses is the expense of repairing them, and compensation for delay in letting them.

Then as to the property let on building leases, the referee has allowed compensation for fall in the rent. But the Plaintiff's ground rents are not diminished, so he suffers no present injury, and the referee does not find that any such permanent injury has been done as will continue to affect the property when the reversion falls in. The item of £330 for depreciation in ground rents ought, therefore, to be struck out.

The item for depreciation of mortgage securities is based on no intelligible principle. It ought to be struck out and an inquiry directed which will shew to what extent the Plaintiff's security has been prejudiced. There ought not to be any damages for a hypothetical delay in letting vacant ground.

Ince, Q.C., and *Ashton Cross*, for the Plaintiff:—

The fair measure of the damage done to the Plaintiff is the diminution in the selling value of his property. It is the known course in a building speculation of this kind to sell the reversion of completed houses in order to raise funds for carrying on the undertaking, and this course of dealing was recognized by all the surveyors who gave evidence. *Hosking* v. *Phillips* (1) lays down that the proper measure of damage is the amount by which the land is lessened in value; and *Jones* v. *Gooday* (2), there cited, lays down the same principle, as do *Wigsell* v. *School for Indigent Blind* (3) and *Whitham* v. *Kershaw* (4). This extends to all the items to which the Appellants object. The selling value of the Plaintiff's interest is diminished, and he ought to be compensated accordingly. The mortgage securities are depreciated in the same way. The Plaintiff cannot realize them.

Jeune, in reply:—

A reversioner cannot claim damages for an injury to the property which is not of such a permanent nature as to injure it

(1) 3 Ex. 168.
(2) 8 M. & W. 146.
(3) 8 Q. B. D. 357.
(4) 16 Q. B. D. 613.

when the reversion falls in: *Simpson* v. *Savage* (1); *Mumford* v. *Oxford, Worcester, and Wolverhampton Railway Company* (2); *Baxter* v. *Taylor* (3); *Jones* v. *Chappell* (4). The cases cited for the Plaintiff are consistent with these, and wholly distinguishable from the present.

Ince, on the cases cited in the reply.

At the conclusion of the arguments the Court said that they would, before giving judgment, see the referee in the Court and ask his grounds for his findings.

The referee attended in Court on the morning of the 14th of February, and gave the explanations asked for by the Court.

Judgment was then reserved till the following day.

1887. Feb. 15. COTTON, L.J.:—

This is an action brought to recover damages for injury caused by the overflow of tidal water on certain land belonging to the Plaintiff, part of which he was laying out for building and part of which was built upon. The Defendants were the owners of docks running across from one bend of the river to the other, and they did not keep up their wall to the height required by statute, and so a rush of water came over their wall and flooded the Plaintiff's land.

The liability of the Defendants was established, and then came a question what were the damages to which the Plaintiff was entitled. The matter was referred to Mr. *Clifton*, and he gave the Plaintiff £1941. That was resisted as regards amount by the Defendants, and Mr. *Clifton* was asked by both parties certain questions for the purpose of ascertaining on what footing he had given that amount. In answer to those questions he made his supplemental report. Mr. Justice *Chitty* allowed the whole amount, and there is an appeal to us.

Now one principle to be borne in mind is that damages can only be granted for injuries which are the direct result of the act of omission or commission complained of. Then it must also be

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(1) 1 C. B. (N.S.) 347.

(2) 1 H. & N. 34.

(3) 4 B. & Ad. 72.

(4) Law Rep. 20 Eq. 539.

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borne in mind that where there are divided interests in land the amount of damages to be paid by the Defendants must not be increased in consequence of that subdivision of interests. All that they ought to be required to pay is damages for the injury caused directly to the whole estate, and if it is cut up into divers interests there is the difficulty of ascertaining, when the parties are not all before the Court, what is to be awarded to the owners of the different interests into which the fee simple is divided, a difficulty which in the present case is considerable.

There is also another principle which must not be forgotten. It is an undoubted general rule that a reversioner or other person who has not an interest in possession in the land cannot recover any damages unless it is shewn that the injury to the land is of a permanent character, and will be injurious to the land when his estate comes into possession. Mr. *Jeune* gives for this the reason (which I think probably is the sound one) that the tenant can bring his action and recover damages for any injury caused by the act complained of to his estate or interest. Then the reversioner can bring an action only for the damages which will continue after the tenant's interest has come to an end and his reversion has become an estate in possession. The Plaintiff here attempts to make an exception, which I will consider when I come to deal with the different items granted by Mr. *Clifton*.

Before I go into particulars I will state what was the general position of the Plaintiff. He had laid out this land for building. On part of it there were houses built; other parts he had agreed to let to builders; and other parts he had not dealt with at all. Then as regards part of the houses he was in possession; the rest were on land which was leased to builders, and where his interest was that of reversioner entitled to rent issuing out of the land. As to other parts of the land he had agreed with builders to grant leases of them; but no leases had been granted, and by his contracts with the builders he had agreed to make them advances from time to time as the houses went on, the amount of such advances to be repaid before the leases were granted.

Let us, then, see into what heads Mr. *Clifton* divided the £1941. There were in *Charles Street* sixteen houses in possession, twelve of which were damaged by the flood. In respect of the twelve, Mr. *Clifton* has given the sum required to repair the injury caused by the overflow. He has also allowed the rent which would have been produced by the houses if let during the time which, in his opinion, it would take to repair them. He has allowed a sum of £32 in respect of the other four houses, the evidence as to which has not been brought before us in such a way that we can really determine whether that sum was rightly given; but we think we ought not to disturb that small amount. The total is £328, which, with the exception of the £32, is given in respect of houses in possession, for repair and loss of rental during the time required for repair.

Then we come to another item—depreciation to these sixteen houses by the reduction of rentals 2*s.* per week on each house, which he allows for four years, and so brings out a sum of £332. We found it difficult to see how, when the houses were put into repair, there could be a depreciation of rental, and in order that we might ascertain on what ground Mr. *Clifton* had given this sum, we asked him to attend here as he did yesterday, and state his views and his ground for giving this sum. He said that there was a prejudice against the locality by reason of the flood, and that this would cause the houses even when put into repair to command a less rental than they would otherwise have done. In my opinion that is not a legitimate ground for giving damages. It is not damage which is the natural result of nor directly caused by the flood. It is entirely different from injury to the structure of the houses, and in my opinion (and I believe the rest of the Court agree) that sum of £332 must be struck out.

Then we come to a point of considerable importance which was argued before us very zealously. Mr. *Clifton* has allowed £330 for "depreciation in ground rents through houses letting at less value." This is objected to altogether, and there is a further objection to part of it, because Mr. *Clifton* has included the *Charles Street* houses which were in possession among those producing ground rents. The Plaintiff's counsel did not dispute the general rule, that a reversioner can only sue in respect of permanent injury which will continue to affect the property when his interest comes into possession; but, as I understand it, the Plaintiff's case was put this way. When a man buys land for the

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purpose of letting it out on building leases the usual course is, that when some of the houses are built and the ground rent is secured, he sells the reversion, or, according to a common expression, sells the ground rent, in order to raise money to go on with the speculation. It is said that, this being so, any depreciation in the selling value of the ground rents is a ground for giving damages to the reversioner. In my opinion that is erroneous. His interest is a reversion, that is to say, his estate in the land is a reversion, and on the general rule he cannot get any damage for any wrongful act of the Defendants unless the damage is one which will endure and be continuing when the reversion becomes an estate in possession. In the present case Mr. *Clifton* told us that there was no injury to the land or to the houses which would endure and exist after the determination of the builders' leases. Now sale is not the natural way of dealing with a reversion, and if it were admitted that every wrongful act which lessens its selling value gives the reversioner a right to damages, the general rule I have mentioned that a reversioner can only recover damages for permanent injury, would entirely be done away with. The argument for the Plaintiff would be forcible if it could be established that this was a regular understood business, and that ground rents and reversions only existed in a case like this for the purpose of bringing them into the market as recognised saleable articles, to be dealt with as any other saleable article would be. But in my opinion it is not all made out that there was here any such recognised trade or business. Therefore, in my opinion, this sum of £330 must also be struck out.

We then come to depreciation of mortgage securities. A considerable part of this land was contracted to be let to builders, the Plaintiff had contracted to make them advances, and he had made advances. What was the nature of his interest? It was not an interest in a reversion at law except this, that the builders who were in occupation were tenants at will. But in a case like this we must look, I think, at what was the real position and interest of the parties. If the builders performed their contracts the Plaintiff was bound in equity to grant them leases for long terms of years; but they were only entitled to have those leases if they duly paid whatever had been advanced by the Plaintiff under the agreement. It appears to me that what ought to have been done was this, to ascertain what sum would have been required to repair the injury to the structure of the houses caused directly by the flood, and then to ascertain how far the houses before they were repaired would have been a sufficient security for the Plaintiff's advances, and if there was a deficiency then to give to the Plaintiff so much of the sum required to repair the damage to the houses, as in addition to the value of the houses in their damaged state would have been sufficient to make good the advances. Unfortunately that is not what has been done by Mr. *Clifton*, because he has taken into account not only the sum required to repair the damage caused to the structure of the houses by the flood, but also the sum which would be required to complete such of these houses as at the date of the flood were incomplete. It was stated to us that the Plaintiff had in fact repaired and completed the houses. The Defendants, in my opinion, are not answerable for the sum required to complete them, and Mr. *Clifton* told us that although as regards the *Arthur Street* houses he had included the sums necessary to complete the houses, he could not say how much of the £700 was required to repair the damage to the houses caused by the flood, and how much for the completion, and, therefore, unless the parties can agree when they know what our view is, we must have an inquiry to ascertain what damage was done to the houses, what was their value before they were repaired, and how much had been advanced by the Plaintiff on them. That will enable the matter to be worked out as to the houses in *Arthur Street*. Then as to the eight houses in *George Street* the amount advanced on them was £440. Mr. *Clifton* does not take an account of the damage done to them, or of the sum required to repair that damage, or even of that sum plus what was required to complete the houses; but he simply says, "Eight houses, amount advanced £440, less value of carcases £240," and he makes the Defendants answerable for the difference of £200. It may be that at the time when the building of the carcases was stopped they were worth very much less than the sum advanced, and the referee appears to have allowed this sum without any reference to the money required to repair the damage done to the buildings, but simply with reference to the fact that the carcases which in ordinary

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course would soon have been completed and made into houses were left incomplete. This is not a correct way of calculating damages, and the inquiry which I have suggested as to the *Arthur Street* houses must be made as regards those in *George Street.*

Then I come to the last item—delay in letting vacant land, and there Mr. *Clifton* has given a sum of £250 for delay in letting. As regards one street he has given six months, and as regards the others he has given three months. What was pressed upon us was this, how can it be said that there has been delay in letting that land caused directly by the flood, inasmuch as none of this land has ever since that time been let? Undoubtedly the non-letting of the land would seem to be attributable to what was called by the Plaintiff, as we were told, a blight on the land, and what was called by Mr. *Clifton* a prejudice against the land. For some reason or other building has ceased here. But then Mr. *Clifton* says: "Yes, but I thought that the land would soon let if the flood had not occurred, and I came to the conclusion on the evidence that this time might properly be granted to the Plaintiff as delay in letting caused by the flood." I feel some difficulty about this, but not having all the evidence before me I am not prepared to differ from him, or to say that this item should be struck out. The entire ceasing of the letting of land on this property is what the Defendants in my opinion are not answerable for, but the land was flooded, and Mr. *Clifton* may have come, and I think did come, to his conclusion on this ground, that as a direct consequence and result of the flood the land was in such a state that for six months as regards one street, and for three months as regards the other streets, it could not be let, and therefore he has said: "Although this land has never been let for building purposes yet, I think, during six months or three months, according to the position of the land, there was in consequence and as the direct effect of the flood an impossibility of the Plaintiff letting the land." In my opinion, therefore, we ought not to disturb that sum of £251 given for delay in letting vacant land.

Lindley, L.J.:—

I have very little to add in this case, and I do not propose to do more than make one or two observations upon two points.

The first is one of some importance, and that is the question what is the proper method of proceeding in cases of this description. Now I take it that the problem to be solved is simply to find out the measure in money of the damage done to the houses and land by the flood. That is the thing to be got at. Having got at that, you have to consider how that sum ought to be apportioned among the persons interested in the property damaged, *i.e.*, in the present case, how much of that sum ought to be awarded to the Plaintiff in respect of his interest, and how much to the tenants who are not before the Court. Unless that principle is kept steadily in view there is great danger of error. If a skilled person is asked to value the damage done to each particular interest in the land without giving him a warning to keep the above principle in mind, there will be great danger of his assessing a number of amounts which in the aggregate will far exceed the total damage done, and it appears to me that that is precisely what has been done here. The great importance of bearing the right principle in mind has induced me to make these remarks.

The only other point to which I will allude is the diminution of ground rents, *i.e.*, the diminution in value of the Plaintiff's reversionary interest. That appears to me to be a wholly inadmissible item. It is established by the report of Mr. *Clifton* and also by what he told us yesterday in Court that no damage has been done to this property of so permanent a nature that the reversion when it falls in will be worth one farthing less. If that is so, how can the reversioner get anything at all in the way of damages? When we are asked to give him something for diminution in the amount for which his reversion would now sell, we should be departing entirely from the principle upon which the Courts have always proceeded in determining the amount of damages to be given to the owner of a reversion for injury to it. The principle is perfectly well settled, and will be found laid down in *Simpson* v. *Savage* (1); in *Mumford* v. *Oxford, Worcester, and Wolverhampton Railway Company* (2), and in *Baxter* v. *Taylor* (3). Upon looking at those cases it will be found that the Court has never given what is in substance a loss of profit. You look to the injury which the reversioner has sustained in respect of his reversion, and whether the injury is of so permanent a character as to affect his property after the expiration of the term. I protest against this novelty, for which there is not a particle of foundation, of allowing damages for the diminution in the selling value of the ground rent, which is making the persons whose negligence caused this flood liable for the profits the landowner made by the mode in which he dealt with the land.

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(1) 1 C. B. (N.S.) 347.

(2) 1 H. & N. 34.

(3) 4 B. & Ad. 72.

I may add that I quite concur in the observations which have been made by Lord Justice *Cotton* on the rest of the case.

LOPES, L.J.:—

I have had full opportunity of discussing these matters with the other Lords Justices, and I quite agree in the conclusions arrived at by Lord Justice *Cotton*. It is quite clear to my mind that this £1941 cannot possibly stand. The damages have, in my opinion, been manipulated in such a way as to produce a result far in excess of any damage directly caused by the flood.

There is only one matter about which I desire to add a word, viz., the delay in letting vacant land, for which Mr. *Clifton* has given £250. I reluctantly acquiesce in this. I doubt in my own mind whether any delay proceeded directly from the flood, but having regard to Mr. *Clifton's* answers given to us in Court and not having the evidence before us, I am induced to think that the Court ought not to interfere with this item.

Feb. 23. The case was mentioned again, and after a good deal of discussion the Lord Justice *Cotton* stated the nature of the order to be made as follows:—

COTTON, L.J.:—

Our order will be this, that from the amount of £1941, found as damages by the referee, the sum of £332, allowed for depreciation to the houses in *Charles Street* by reduction of rentals, the sum of £330 for depreciation of ground rents through houses letting at less value, and the sum of £700 allowed for the depreciation of securities, must be deducted. Then direct an inquiry (which I think should go back to Mr. *Clifton*) what was the sum required to repair the damage caused directly by the flood to the twenty-four houses in *Arthur Street* and to the eight houses in *George Street*; what was the value of those houses immediately before the flood and what was their value immediately after. That will enable us to determine what ought to be paid to the Plaintiff, the question being how much of the money required to repair the injury caused directly by the flood to those houses ought to go to him in order to put him in the same position as regards security as he was in before the flood. Mr. *Clifton* must not take into account anything but what will be required to make good the actual damage to the houses caused directly and immediately by the flood, he must not take into consideration any prejudice which might be caused by the flood to the houses, nor any sum required to complete the houses and put them into a better position than that in which they were immediately before the flood. There must be that inquiry. After that inquiry the matter must come before us again, and we will then deal not only with the costs of that inquiry, but with the costs of the appeal.

Solicitors for Plaintiff: *Watson, Sons, & Room.*

Solicitors for *Victoria Dock Company: Gedge, Kirby & Millett.*

Solicitors for *London and St. Katharine Dock Co.: Hacon & Turner.*

H. C. J.

C. A.
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NORTH, J.
May 23.
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June 22.

In re WRAY (A SOLICITOR).

Solicitor—Attachment for Default in Payment of Money—Receiving Order in Bankruptcy—Jurisdiction—Discretion—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4, *sub-s.* 4 [*Revised Ed. Statutes, vol. xvi., p.* 112]—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 9, 10.

Held, by *North*, J., that an attachment against a solicitor for his default in the payment of a sum of money, which he has been ordered to pay in his character of an officer of the Court, is not a merely civil process, but is in its nature punitive or disciplinary, and therefore the fact that a receiving order in bankruptcy has been made against the solicitor is not of itself a sufficient reason for refusing to issue an attachment against him in such a case; but, that when such an order for the payment of money has been made against a solicitor before the making of a receiving order against him, and he has not obeyed it, the Court has, under sect. 10 of the *Bankruptcy Act*, 1883, a discretion whether it will order an attachment to issue by way of punishment to the solicitor, and it will decline to do so if it is satisfied that the person who asks for the order can derive no benefit from it, and that the making of it will embarrass the bankruptcy proceedings.

Held, also, that sect. 9, sub-sect. 1, of the *Bankruptcy Act*, 1883, does not apply to proceedings pending against a debtor at the time when a receiving order is made against him.

Held, on appeal, that the Court of Appeal would not interfere with the discretion of the Court below.

MOTION, entitled in the matter of *Aaron Wray*, a solicitor of the Supreme Court, asking that the applicants might be at liberty to issue a writ of attachment against *Wray* for his contempt in not paying to *Samuel Ake*, one of the applicants, a sum of £350 and interest, pursuant to an order of Mr. Justice *North* dated the 7th of March, 1887.

The applicants were *Ake*, who was the surviving trustee of the will of *William Simpson*, deceased, and the residuary legatees under that will. *Wray* had acted as solicitor for the trustees, and in that character had received from them two sums of £250 and £100 for the purpose of investment, and had not invested them. The order of the 7th of March was made in the matter of the solicitor upon the application of the present applicants, and it ordered that *Wray* should on or before the 7th of April, 1887, or subsequently within seven days after service of the order upon him, pay to *Ake* the sum of £350 "being moneys in his hands and received by him as solicitor for *Eliza Simpson*, now deceased, and the said *Samuel Ake*, the trustees of the will of *William Simpson*, deceased." And it was further ordered that *Wray* should within the like period pay to *Ake* interest on the £350 from the 7th of April, 1887, at the rate of 5 per cent. per annum, to the day of payment. And it was also ordered that *Wray* should pay to the Applicants the costs of their application.

In the course of his judgment on that occasion, Mr. Justice *North* said that he had come to the conclusion on the evidence that *Wray* had received the £250 for investment; that he had never really invested it, but that he had put it into his own pocket; that he had received the £100 for investment, and had not invested it on proper security.

On the 22nd of March, 1887, the order was personally served on *Wray*, with the proper memorandum indorsed on it, but he did not pay the £350, or any part of it, within the time appointed.

On the 27th of April the present notice of motion, which was dated the 22nd of April, was duly served on *Wray* personally, and on the 28th of April it was served on his solicitor. On the 25th of April a receiving order in bankruptcy had been made against him on the petition of one of his creditors, but the Applicants had no knowledge of this until after the service of the notice of motion.

The motion was heard before Mr. Justice *North* on the 23rd of May, 1887.

Warrington, for the motion:—

This motion is made under sub-sect. 4 of sect. 4 (1) of the

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(1) Sect. 4 provides that "with the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment:" (*inter alia*)

"(4.) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money, when ordered to pay the same in his character of an officer of the Court making the order."

Sect. 9 of the *Bankruptcy Act*, 1883, provides by sub-sect. (1): "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any

Debtors Act, 1869. It will be contended on the other side that the receiving order has deprived the Applicants of their right to an attachment. This depends upon the construction of sub-sect. 1 of sect. 9 and sub-sect. 2 of sect. 10 of the *Bankruptcy Act*, 1883. The attachment in such a case is not a civil process for enforcing payment of the debt—it is not "a remedy against the property or person of the debtor in respect of the debt"—but it is, as was said by Lord Justice *Fry* in *In re Freston* (1), "punitive or disciplinary" against the solicitor as an officer of the Court. Therefore the receiving order does not affect the right of the Applicants to ask for an attachment. In *In re Freston* (2), the Court of Appeal held that a solicitor, against whom an attachment had been granted because of his disobedience to an order made against him as an officer of the Court, was not privileged from arrest on the ground that when arrested he was returning to his office from a police court where he had been acting as advocate for a client. The ground of the decision was that the attachment was issued by way of punishment, and that applies to the present case. *In re Dudley* (3) is to the same effect. It may be said that *Cobham* v. *Dalton* (4) is an authority to the contrary. But there the attachment had been issued against a bankrupt trustee who had been ordered in a suit in the Court of Chancery to pay trust money into Court, and had disobeyed the order. The ground of the decision was that, though the bankrupt would not be released from the debt by an order of discharge, yet, the debt being provable in the bankruptcy, he was, pending the bankruptcy proceedings, protected from arrest by sect. 12 of the *Bankruptcy Act*, 1869. *In re Deere* (5) shews that this is the distinction. In

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debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

By sect. 10, sub-sect. (2): "The Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

(1) 11 Q. B. D. 545, 557.

(2) Ibid. 545.

(3) 12 Q. B. D. 44.

(4) Law Rep. 10 Ch. 655.

(5) Ibid. 658.

that case a solicitor had been ordered by the Court of Exchequer to pay a sum of money due from him as solicitor. He failed to obey the order, and was adjudicated a bankrupt. He was afterwards arrested under an attachment issued by the Court of Exchequer. The Court of Appeal in Bankruptcy refused an application for his discharge, Lord Justice *Mellish* saying that "the question whether the attachment was issued for punishment or merely to enforce compliance with the order for payment of money, ought to be decided by the Court which made the order." If sect. 12 of the *Bankruptcy Act,* 1869, had applied, the Court of Appeal would have had no discretion in the matter, but would have been bound to order the bankrupt to be released from prison.

Bunting, for the solicitor:—

In re Freston (1) was not a decision upon the *Bankruptcy Act.* No doubt the Court has a jurisdiction of a "punitive or disciplinary" nature over a solicitor as its officer, to punish his contempt in disobeying an order made against him as such, and sect. 4 of the *Debtors Act* preserves the power of arresting a solicitor for the non-payment of money which he has been ordered to pay in that character. But here the Applicants are really prosecuting a private remedy in their own interest, in order to enforce payment of the money by the solicitor or by his friends. Therefore sect. 9 of the *Bankruptcy Act* applies. The attachment is a creditor's "remedy against the person of the debtor in respect of the debt."

Moreover, the attachment is a "legal process against the person of the debtor" within the meaning of sect. 10, and it was commenced after the making of the receiving order by the service of the notice of motion. Therefore, under sect. 10, either the Court of Bankruptcy or this Court has a discretion to stay the proceedings.

Moreover, the circumstances of the present case are such that the Court should, in the exercise of the discretion given to it by sect. 1 of the *Debtors Act,* 1878 (41 & 42 Vict. c. 54) refuse to issue an attachment: *Barrett* v. *Hammond* (2); *Marris* v. *Ingram* (3); *Holroyde* v. *Garnett* (4). The solicitor was not guilty of fraudulent or dishonest conduct. The Court will not allow an attachment to be made use of for purposes of private vengeance. The evidence shews that since the order of the 7th of March was made the solicitor has made every possible effort to comply with it. And the fact that a receiving order has been made against him shews that he is unable to pay the money.

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(1) 11 Q. B. D. 545.
(2) 10 Ch. D. 285.
(3) 13 Ch. D. 338.
(4) 20 Ch. D. 532.

Warrington, in reply.

NORTH, J. (after stating the facts and reading the notice of motion, continued):—

I may say at once that I could not order an attachment to issue for the non-payment of the interest which the solicitor was ordered to pay, for that interest was not money in his hands for which he was responsible as a solicitor.

Two objections have been raised by Mr. *Bunting* to the issue of an attachment. The first is, that, under the Act of 1878 the Court has a discretion to consider whether, under all the circumstances of the case, it would be right to allow an attachment to issue. Beyond all question that is so. But, speaking from my recollection of the facts which were brought before me when I made the order of the 7th of March, if my decision depended merely upon the discretion which I have under the Act of 1878, I should consider that the attachment ought to issue, if no other facts were before me now but those which were before me then. But a new fact has since arisen. On the 25th of April a receiving order was made against the solicitor, and it is said that I have now no jurisdiction to order the issue of an attachment, because an attachment is only a civil process for enforcing the payment of the debt. It is, however, clear on the authority of *In re Freston* (1), and *In re Dudley* (2), that an attachment against a solicitor for the non-payment of money received by him in the character of solicitor for investment, and which he has been ordered by the Court to pay, is not merely a civil process, but is in its nature "punitive or disciplinary," and that the Court is not bound to look solely at those considerations which would arise in the case of a merely civil process. The existence of a receiving order against the solicitor is not of itself a sufficient reason why an attachment should not issue against a solicitor in such a case as the present. It appears to me that a proceeding by way of attachment against a defaulting solicitor under sub-sect. 4 of sect. 4 of the *Debtors Act*, 1869, is not merely a remedy against his property or person in respect of a debt provable in his bankruptcy, but is a proceeding by way of punishment for an offence committed by him as an officer of the Court. Moreover, sect. 9 has no reference to proceedings which are actually pending against the debtor at the date of the receiving order, and consequently the present application is not within that section. The application for an attachment is only a continuing of the proceedings which led to the making of the order of the 7th of March. But sect. 10 does apply to the present case, and it is clear that under that section the Court in which proceedings are pending against a debtor at the time of the presentation of a bankruptcy petition against him, has a discretion either to stay the proceedings or to allow them to continue on such terms as it may think just.

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(1) 11 Q. B. D. 545.

(2) 12 Q. B. D. 44.

Two courses are open to a debtor against whom an application is made in pending proceedings after the presentation of a bankruptcy petition against him. He may apply to the Court in which the proceedings are pending to stay them. No formal application has been made to me to stay the proceedings in the present case; but I will treat the opposition to this motion as equivalent to such an application. The other course is, to apply to the Court of Bankruptcy to stay the proceedings. I have no doubt that, if such an application had been made to the Court of Bankruptcy in the present case, that Court would have adopted a course similar to that which was taken by the Court of Appeal in *In re Deere* (1), and would have declined to interfere, leaving it to this Court to say whether the attachment ought to be issued by way of punishment upon the solicitor or not. It seems to me clear, having regard to the provisions of the *Debtors Act* and the *Bankruptcy Act*, that the existence of the receiving order is not of itself under the circumstances of the case an answer to the application for an attachment. But I feel a difficulty about

(1) Law Rep. 10 Ch. 658.

making the order, because I cannot see what benefit the Applicants would under the circumstances derive from it. It is clearly open to me to make the order if I should think fit to do so. But, having regard to the fact that a receiving order has been made against the debtor, and that the issue of an attachment against him might greatly embarrass the bankruptcy proceedings, I think that, in the exercise of the discretion which I have under sect. 10, I ought not to make the order by way of punishment on him. But I think the application was one which it was proper to make, and it was made without any notice of the receiving order. Therefore, although I do not think fit to make an order for attachment, I must order the solicitor to pay the costs of this motion. I think I have clear jurisdiction, notwithstanding the bankruptcy proceedings, to order him to do this.

W. L. C.

C. A. The Applicants appealed from this decision, and the appeal was heard on the 22nd of June, 1887.

Warrington, for the appeal:—

The Court below said that the order should not be made because we could get no benefit from it, but the answer is that, as Mr. Justice *North* himself said, this is a proceeding by way of punishment.

[BOWEN, L.J.:—Is there any authority for our thus interfering with the discretion of the Judge below?]

Jarmain v. *Chatterton* (1) supports it. The decision in the present case in fact comes to this: that in no case where a receiving order has been made in bankruptcy can an attachment be ordered under the section, for it is not alleged that there are special circumstances.

Bunting, contrà, was not called upon.

COTTON, L.J.:—

This is an appeal from Mr. Justice *North*. If the Judge had held that the existence of the receiving order deprived him of jurisdiction to order the attachment, or that on any other grounds he had no such jurisdiction, we must have entertained the appeal. But as I understand the matter, Mr. Justice *North* said that he had jurisdiction to issue the attachment, but, looking at all the circumstances of the case, he, in the exercise of his discretion declined to do so. I give no opinion what order I should have made if I had been hearing the application in the first instance, but I cannot concur in interfering with the discretion of the Judge below. In the case of a motion to commit for contempt, if the Judge below merely orders the party against whom the application is made to pay the costs of the motion, I think it would be wrong for the Court of Appeal to interfere by committing, though if the contempt was deliberate it would be a serious question whether the Judge below was right. I do not say that in no case would the Court of Appeal so interfere, but it must be a case of gross miscarriage.

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(1) 20 Ch. D. 493.

BOWEN and FRY, L.JJ., concurred.

Solicitors for Applicants: *Collyer-Bristow & Co.*, agents for *E. Laverack, Hull.*

Solicitors for Respondent: *Hickin & Fox*, agents for *G. A. Wray, Hull.*

H. C. J.

ALLCARD *v.* SKINNER.

[1885 A. 1271.]

C. A.
1887
KEKEWICH, J.
Jan. 20, 21, 22, 24, 25, 31.
C. A.
May 13, 16, 17;
July 9

Undue Influence—Convent—Rules of Poverty and Obedience—Voluntary Gift of Property—Laches—Acquiescence.

In 1868 *A.* was introduced by *N.*, her spiritual director and confessor, to *S.*, the lady superior of a sisterhood, and became an associate of the sisterhood. *N.* was one of the founders and also the spiritual director and confessor of the sisterhood, which was an association of ladies who devoted themselves to charitable works. In 1871 *A.*, having passed through the grades of postulant and novice, became a professed member of the sisterhood and bound herself to observe (*inter alia*) the rules of poverty, chastity, and obedience, by which the sisterhood was regulated, and which were made known to her when she became an associate. These rules were drawn up by *N.* The rule of poverty required the member to give up all her property, either to her relatives, or to the poor, or to the sisterhood itself, but the forms in the schedule to the rule were in favour of the sisterhood, and provided that property made over to the lady superior should be held by her in trust for the general purposes of the sisterhood. The rule of obedience required the member to regard the voice of her superior as the voice of God. The rules also enjoined that no sister should seek advice of any extern without the superior's leave.

A., within a few days after becoming a member, made a will bequeathing all her property to *S.*; and in 1872 and 1874, having become possessed of considerable property, handed over and transferred several large sums of money and railway stock to *S.* In May, 1879, *A.* left the sisterhood and immediately revoked her will, but made no demand for the return of her property until 1885, when she commenced an action against *S.* claiming the return of her property on the ground that it was made over by her while acting under the paramount and undue influence of *S.*, and without any independent and separate advice:—

Held, that although *A.* had voluntarily and while she had independent advice entered the sisterhood with the intention of devoting her fortune to it, yet as at the time when she made the gifts she was subject to the influence of *S.* and *N.*, and to the rules of the sisterhood, she would have been entitled on leaving the sisterhood to claim the restitution of such part of her property as was still in the hands of *S.*, but not of such part as had been expended on the purposes of the sisterhood while she remained in it:—

But *held*, by the Court of Appeal (*dissentiente Cotton*, L.J.) (affirming the decision of *Kekewich*, J.), that under the circumstances the Plaintiff's claim was barred by her laches and acquiescence since she left the sisterhood.

THIS was an action to recover certain sums of money and railway stock alleged to have been made over and transferred by the Plaintiff to the Defendant Miss *Skinner* whilst acting under the undue influence of that Defendant, and without any independent and separate advice.

In June, 1868, the Plaintiff, Miss *M. A. Allcard*, being about thirty-five years of age, was desirous of devoting herself to good works, and was introduced by the Rev. *D. Nihill*, then her spiritual director and confessor, to Miss *Skinner*, who was then the lady superior of a Protestant institution known as "*The Sisters of the Poor.*" This institution or sisterhood was a voluntary association of ladies who resided together in *Mark Street, Finsbury, E.C.*, and devoted themselves to works of charity under the direction of Miss *Skinner*. The Rev. *D. Nihill* and Miss *Skinner* were the founders of the sisterhood; and the Rev. *D. Nihill* was, from its

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inception, the spiritual director and confessor of the sisterhood, and drew up all the rules by which it was governed. After becoming thus acquainted with Miss *Skinner*, the Plaintiff, as an associate of the sisterhood, saw much of Miss *Skinner*, and, ultimately, in January, 1870, became a "postulant" of the sisterhood. In April, 1870, the Plaintiff became a "novice," and in August, 1871, she became a professed member of the sisterhood, and bound herself to observe (*inter alia*) the rules of poverty, chastity, and obedience. These rules, which had been formulated by the Rev. *D. Nihill*, and had been made known to the Plaintiff before and at the time she became a "postulant," were, so far as is material, as follows:—

"Of Receiving Reproof.

"'The beginning of strife is as when one letteth out water,' but as there is no room for strife between the creature and the Creator, so likewise between thee and thy Superior, who standeth to thee in the place of God. . . . Now, therefore, understand how thou oughtest to receive reproof from thy Superior, whether it be just or unjust. I say not whether unto thee it appeareth just or unjust, for how can the guilty sit in judgment on the Judge, and the moment thou beginnest to question the justice of thy Superior's reproof thou beginnest to sin.

"First, then, when thou are reproved, remember that the voice of thy Superior is the voice of God. Listen on thy knees in perfect silence and defend not thyself. Keep silence till thou are bidden to speak, and then let thy words be reverent and few. . . .

"Of Poverty.

* * * * *

"Behold then the three strong walls that shall keep safe within your hearts the spirit of Poverty. They are—

"1. The cutting off of possessions.
"2. Hardness of Life.
"3. Love of the Poor."

[The rule then went on to enjoin the absolute giving up of all individual property, whether it were given up to relatives or friends of the member, or to the poor or to the

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sisterhood itself, and that if it were given up to the sisterhood it should not be required or reclaimed by the members on leaving the sisterhood. All the forms of gift in the schedule to this rule were in favour of the sisterhood.]

"Of Obedience.

* * * * *

"What, then, is obedience as it must be lived in by you. First, it consists in regarding the voice of your Superior as the voice of God. . . . The letter of your Rule and the living voice of your Superior are nothing else but helps and guides to the end that ye may the more perfectly do the will of God. Therefore, as in obeying your Superior ye seek to obey God, so in the command of your Superior ye must necessarily hear the voice of God. . . . And let those whose it is to obey consider not the person whom they obey, but in her ever behold Christ the Lord for whose sake they obey her. Let this obedience be willing, loving, absolute, prompt, unhesitating, and trustful. Let them never think it of little moment to obey in any matter, whether great or small, nor ever desire any reason for an act of obedience. . . .

"Common Rules.

* * * * *

"XXX. Let no sister speak or write to externs about what happens in the Convent unless she have reason to think that it is the wish of the Superior. Rules and other written matter belonging to the Convent are not to be shewn or rehearsed to any one outside but by the express permission of the Superior.

"XXXI. Let no Sister seek advice of any extern without the Superior's leave."

The rules also provided that all property made over to the superior for the time being should be held by her on trust for the sisterhood; and, in fact, all property received by Miss *Skinner* was thrown into a common fund, and used for the general purposes of the sisterhood, and the accounts were kept by the Rev. *D. Nihill.*

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In 1870 the Plaintiff became entitled to considerable property under her father's will, in part of which she had an absolute interest, and in part she had an estate for life with power of disposition by will. She was also entitled to the income for life of a further portion without any power over the capital.

In March, 1870, the Plaintiff, shortly after she became a "postulant," made a will leaving all her property to Miss *Skinner*, and, whilst she was a member of the sisterhood, made over (*inter alia*) the following property to Miss *Skinner*, viz.:—

In September, 1871, two cheques amounting to £1050.

On the 4th of July, 1874, £937 10*s.* *Glasgow and Greenock* preference stock, which was subsequently invested in £1171 4 per cent. guaranteed annuities stock of the *Caledonian Railway Company*.

On the 8th of July, 1874, £3943 *Midland Railway* ordinary stock.

On the 28th of March, 1876, eleven preference shares of the *Cannock Chase Colliery Company, Limited*, valued at £990.

The greater part of these funds had been spent for the purposes of the sisterhood before the action was brought, but the sum of £1171 stock of the *Caledonion Railway Company* and £500 stock of the *Midland Railway Company* remained in Miss *Skinner's* hands.

In May, 1879, the Plaintiff left the sisterhood and immediately revoked her will, but made no claim for the return of her property until March, 1885, and did not issue the writ in this action until August, 1885. The Plaintiff by her statement of claim alleged that she was induced to make over the abovementioned property whilst acting under the direction and paramount influence of Miss *Skinner*, and without any separate or independent advice, and without any due consideration of the reasons for or effect of what she was doing, and claimed:—1. A declaration that the property made over by her to the Defendant *Skinner* was made over to that Defendant as trustee for her and not by way of gift. 2. Or, in the alternative, a declaration that the Plaintiff was induced to make over the property by the undue influence of the Defendant *Skinner*. 3. In any case, repayment of the moneys and re-transfers of the railway stock.

4. An injunction to restrain the Defendant *Skinner* from transferring or dealing with the railway stock, and to restrain the railway companies (who were made formal Defendants) from registering transfers of the same.

The Defendant *Skinner*, by her statement of defence, traversed the allegations in the claim, and alleged that the Plaintiff joined the sisterhood of her own independent desire and was in no way influenced by her or the Rev. *D. Nihill*; that the Plaintiff became a professed member of the sisterhood of her own deliberate choice, and at the time she became a member had determined voluntarily and deliberately to employ her property for the benefit of the sisterhood; that the sisterhood whilst the Plaintiff was a member, and with her concurrence and approval, had expended in erecting hospitals and other buildings a much larger sum than the amount of stocks claimed by her, and had undertaken obligations which they could not fulfil without the assistance of the funds voluntarily contributed by the Plaintiff to the purposes of the sisterhood; that the Defendant *Skinner* made no personal claim to the property except as a member of the sisterhood, and relied on the laches and acquiescence of the Plaintiff as a bar to her claim.

Issue was joined. This was the trial of the action. Some further details are stated in the judgments of Mr. Justice *Kekewich* and Lord Justice *Lindley*.

The action came on for hearing before Mr. Justice *Kekewich* on the 20th of January, 1887.

Sir *C. Russell*, Q.C., *Finlay*, Q.C., and *F. B. Palmer*, for the Plaintiff:—

These gifts were made under such circumstances that they cannot be upheld. The spiritual influence is the most subtle of all, and there was produced and maintained in this lady such a state of mind and subjection as to invalidate any gift made by her to the person exercising that influence. The test is "how the intention was produced:" *Huguenin* v. *Baseley* (1). The influence was exercised once for all when she first joined the sisterhood, and was maintained and intensified by the rules and by the daily discipline of the convent, which produced a state of unreasoning obedience in the persons brought within the sphere of that influence. These rules are most remarkable, and assume a most obnoxious aspect in the eyes of the law, and they were laid down by two persons not subject to any ecclesiastical superior or outside visitation, and this intensified their personal influence. The burthen of proof is on the Defendant to shew that the Plaintiff had competent independent advice before making these gifts: *Rhodes* v. *Bate* (1). As to laches and acquiescence, time only begins to run from the date when a party first becomes aware of what her rights really are, and inaction is not acquiescence: *Savery* v. *King* (2); *Lindsay Petroleum Company* v. *Hurd* (3); *De Bussche* v. *Alt* (4). Here the Plaintiff first knew her real rights in November, 1884, when she heard that a Miss *Merriman*, a former member, had recovered her property. It is no answer to say that the money has been spent, the Defendant must shew acts or course of conduct amounting to a clear intention to abandon the right to relief.

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(1) 14 Ves. 273.

Sir *E. Clarke*, S.G., *Warmington*, Q.C., and *E. Ford*, for the Defendant Miss *Skinner*:—

We admit that this property was made over to the Defendant, not by way of gift, but as trustee for the sisterhood, and she holds that and all other property committed to her upon the trusts of the sisterhood. Those trusts are legal, clearly defined, and enforceable in this Court. There is no case in the books in which where property has been handed over upon trusts in which the donor and donee and others have a common interest, the Court had ordered that property to be returned. But assuming the Court can interfere, the Plaintiff has failed to shew that these gifts were obtained by undue influence. We say this property was handed over pursuant to the obligations she took upon herself when she first joined the sisterhood. There is no trace of any fresh influence when she handed over the cheques and executed the transfers. The evidence shews that these transactions are all referable back to the time when, after consulting her relatives, she, with full knowledge and perfect freedom, and after solemn consideration, took upon herself these vows with the fixed intention of devoting herself and her property to this charity. The proposition that everything done after entering a convent is done under undue influence, is not settled by authority and is a very difficult one: *Whyte* v. *Meade* (1); *Fulham* v. *McCarthy* (2). This is not a case, like *Huguenin* v. *Baseley* (3), of a person using her influence for her own benefit.

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(1) Law Rep. 1 Ch. 252.
(2) 5 H. L. C. 627.
(3) Law Rep. 5 P. C. 221.
(4) 8 Ch. D. 286.

[KEKEWICH, J.:—Is there any difference between the case of a person using undue influence for himself and where he uses it for the benefit of others?]

Yes. In all the reported cases the undue influence has been exerted for the benefit of the donee. The principle applicable to this case is clearly laid down in *Hoghton* v. *Hoghton* (4); *Archer* v. *Hudson* (5); *Hunter* v. *Atkins* (6); *Nottidge* v. *Prince* (7); *Blake* v. *Blake* (8); *Re Metcalfe's Trusts* (9). But assuming the gifts were revocable, they cannot now be revoked years after the money has been spent, with the Plaintiff's approval, in establishing the charity with which she was associated. She is barred by laches and acquiescence. Time began to run against her in May, 1879, when she executed a fresh will. She was then quite independent of any spiritual control or influence, if it had at any time previously existed, and evidently discussed her affairs with her brother, and must be taken to have known her rights and to have elected to abide by the gifts she had made to the convent: *Lindsay Petroleum Company* v. *Hurd* (10); *Mitchell* v. *Homfray* (11); *Wright* v. *Vanderplank* (12).

Haldane, and *Sargant,* for the Railway Companies.

Sir *Charles Russell,* in reply:—

Whether the undue influence is exerted solely for the benefit of the donee or for the benefit of other parties, the principle is the

(1) 2 Ir. Eq. Rep. 420.
(2) 1 H. L. C. 703.
(3) 14 Ves. 273.
(4) 15 Beav. 278.
(5) 7 Beav. 551.
(6) 3 My. & K. 113, 135.
(7) 2 Giff. 246.
(8) 4 Ir. Ch. Rep. 349.
(9) 2 D. J. & S. 122.
(10) Law Rep. 5 P. C. 221.
(11) 8 Q. B. D. 587.
(12) 8 D. M. & G. 133.

same. The Court will not in such cases allow mere volunteers to retain the gift: *Huguenin* v. *Baseley* (1); *Rhodes* v. *Bate* (2). The cases of *Whyte* v. *Meade* (3), and *Fulham* v. *McCarthy* (4) are not in point. They were decided on other grounds. The test is what is the effect and object of these rules on the mind and body of persons subjected to them. Their object is to efface absolutely the free will of the individual and to substitute the will of the lady superior, and the result is, that the individual becomes a mere cipher and does automatically and in obedience to the will of the lady superior what she is directed to do. The law requires that gifts made under such circumstances shall not be upheld unless the donor had competent independent legal advice.

[KEKEWICH, J.:—The cases do not say that the advice must be legal, but competent and independent.]

True. But in the great majority of cases, as in this case, the circumstances are such that the competent, independent advice must necessarily be legal advice. As to laches and acquiescence, before relief is refused the Defendant must shew that the Plaintiff knew her rights in 1879; that knowing them, she deliberately abstained from asserting them; that she did so to the prejudice of the sisterhood; and that the sisterhood, relying on her conduct, have altered their position injuriously to themselves. We submit the Defendant has failed to discharge that *onus*.

Jan. 31, 1887. KEKEWICH, J.:—

The question to be decided in this case is whether the Plaintiff, Miss *Allcard*, is entitled to avoid certain gifts made by her in favour of an association of which she was for many years, but is not now, a member. That the association was founded and maintained for religious purposes; that its founder and spiritual director, and, as regards matters of business, its only responsible officer, was a clergyman of the *Church of England*; that the association was intended to be a *Church of England* association; and that the Plaintiff has since she quitted it become, and

(1) 14 Ves. 273.
(2) Law Rep. 1 Ch. 252.
(3) 2 Ir. Eq. Rep. 420.
(4) 1 H. L. C. 703.

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quitted it because she wished to become, a member of the *Church of Rome*, are historical facts in the case—not to be forgotten, but having no bearing, except as historical facts, on the issues to be decided. There are issues of law (depending, of course, as issues of law ever do, on the facts proved or admitted), and I have considered and I intend to decide them without regard to any claims which, were I not deciding them, either party might have had on my sympathy. The facts necessary to be borne in mind are numerous and important, but fortunately there is but little dispute about them. Here and there one finds a conflict of evidence in some matter of detail, and here and there some uncertainty about the date or particulars of a given transaction or event; but, regarded as a whole, the evidence, now that it is all before the Court, is a consistent and satisfactory record of the events to which it was directed. I do not propose to recapitulate it at any length; I shall only mention those facts which seem to me necessary by way of explanation of the conclusions at which I have arrived. The Plaintiff is the daughter of a gentleman of considerable fortune who died in the year 1861, when she had already attained majority, He left a widow and several children besides the Plaintiff. The eldest son, Mr. *W. H. Allcard*, is a member of the Bar. He does not appear to have practised, but in the course of his legal studies or otherwise he learned the art of so expressing himself in writing about matters of business as to make his statements clear and easily understood by any intelligent person, and I think, too, that his letters shew capacity of giving distinct and prudent advice. This Mr. *Allcard* was trustee—not the sole trustee, but the most active one—of the father's will. By that will, subject to a provision for the widow and an annuity which afterwards dropped, the estate was directed to be distributed among the children on the youngest attaining twenty-one. It does not appear what provision was made for Miss *Allcard* until that date, but I take it for granted that there was some provision, and, having regard to the ultimate benefits taken by her under the will, such provision was probably of a substantial character. On the youngest brother attaining twenty-one, which happened in 1870, her distributive share of her father's estate may be thus stated:—First, she was entitled to a sum of about £8000 absolutely; secondly, she was entitled to a further sum of like amount for life, with a power of disposition by will only; and thirdly, she was entitled for life to the income of £5000, over which she had no power of disposition at all. On the dropping of the annuity before-mentioned she became entitled to something more, and it seems, too—though it has not been proved or stated—that on the death of her mother she will be entitled to some share of the property appropriated for the provision of that lady's income. Miss *Allcard's* father having died, as already stated, in 1861, she continued to live at home with her mother until she joined the sisterhood to be presently mentioned. There is no record of her home life, nor is there evidence of any other member of the family living under the same roof, but it may be inferred from the correspondence that the elder brother, as also another whose name is not mentioned, was a frequent visitor; and it is a reasonable conclusion that, while remaining at home, Miss *Allcard* obtained sufficient information respecting her father's estate and the contents of his will to enable her to understand and appreciate her own position with regard to them. The subsequent letters of the brother, to which I must again refer, would be unintelligible if this were not the case. In 1868, whether because unhappy at home (of which there is a trace), or because anxious to devote herself to good works, she consulted some clergyman, who introduced her to Mr. *Nihill*, a person of some importance in this case. Mr. *Nihill* had then lately come to *London* from *Manchester*, and was curate or vicar (I am not sure which) of *St. Mark's, Finsbury*. He was then in the process of founding, with the assistance of the Defendant, Miss *Skinner*, the association to which it will be convenient to refer as "the sisterhood." It consisted at that time of Miss *Skinner* herself and some two or more ladies, who occupied rooms in a model lodging-house, and had no definite rules reduced into writing. But the idea was not entirely new. It had been mooted in *Manchester*, whence both Mr. *Nihill* and Miss *Skinner* had migrated. Its general purposes were well understood, and these, as well as the rules subsequently framed, are foreshadowed in two letters of Mr. *Nihill*, dated one in 1865, and the other on the 27th of August, 1866, which have been produced. Mr. *Nihill* introduced Miss *Allcard* to Miss *Skinner* as the person best calculated to provide the employment for which she was asking. She did not at once join the sisterhood. In July, 1868, she became an associate—that is, she was permitted to help the sisters in their good works, but was not one of the body, did not reside with them, and was free to come and go as she pleased. Influenced she no doubt was by those with whom she spent the greater part of her time and strength; but she was not removed from the influence of home, and her mother and brother knew what she was doing, and apparently did not hesitate to express their objections to the prospect before her. While occupying this position she must have learned what would be demanded of her if she joined the sisterhood, and she must have known that her fortune would be a handsome contribution to the accomplishment of works then contemplated. After an interval of eighteen months—viz., in January, 1870—Miss *Allcard* entered the third and lowest order of the sisterhood; she became a postulant. From that time she turned her back on her home and bound herself to the religious life. True she was still entitled, according to the rules of the sisterhood, to leave it, and she had no more appropriated her property than her life to the work; but she had submitted to an influence which is known to be powerful and seldom loses or is allowed to lose its hold. While a postulant she made a will in favour of the sisterhood. It was a rule that a postulant should make a will, but, according to the rule, the destination of her property was unfettered, the avowed object being, not that she should endow the sisterhood, but that she should pauperize herself. The evidence is not distinct respecting the circumstances under which the will was made. There is none to shew that either Mr. *Nihill* or Miss *Skinner* dictated to Miss *Allcard* the disposition of her property, but I think that the substance of the will was the natural result of the convent influence, and it is not too much to say that the like influence must have prompted the terms of gift. Miss *Allcard* was admitted to the novitiate in April, 1870. She was therefore a postulant for much less than the prescribed term of six months, but this is readily accounted for by the long period during which she was merely an associate. In August, 1871, she was admitted a full member of the sisterhood—that is to say, so far as vows could bind her for life. For some reason, however, she became dissatisfied with her position, and ultimately she left the convent on the 9th of May, 1879—that is, nearly eight years after she became a sister, and nearly eleven years after she became an associate. On the 16th of the same month she formally joined the *Church of Rome*, with which her heart had apparently been for some time before. During the period to which I have just referred Miss *Allcard* bestowed a large portion of her fortune on the sisterhood. She had not executed a deed of gift such as prescribed by the rules. Why this was not required of her has not been explained, nor is any explanation necessary. She had, as already stated, made a will, which was of course, liable to be revoked, but if unrevoked would have operated largely for the benefit of the sisterhood. She had received from her brother from time to time payment of her income, that is, the annual produce of so much of her fortune as was not realized; and she had also received from him the capital to which she was entitled on the distribution of her father's estate. The whole of this, both income and capital, was devoted to the sisterhood, and was made over to Miss *Skinner* for that purpose. Miss *Allcard* seeks to avoid only six items of gift, which are mentioned in the fourth paragraph of the statement of claim, but it is necessary to remember that these were not all, and that those not included in the list were of considerable amount. No one suggests that there was impropriety or illegality in these gifts or any of them. The law neither encourages nor discourages such associations as this sisterhood, or gifts made by charitably disposed persons to them. The law allows absolute freedom of disposition, and only insists that when challenged, under such circumstances as exist here, the disposition shall be proved to have been absolutely free. What is required by law for the fulfilment of this condition? The law does not exclude influence. Nay, it recognises influence as natural and right. Few, if any, men are gifted with characters enabling them to act, or even think, with complete independence of others, which could not largely exist without destroying the foundations of society. But the law requires that influence, however natural and however right, shall not be unduly exercised, that is, shall be exercised only in due proportion to the surrounding circumstances and the strength of the person submitted to it. The more powerful influence or the weaker patient alike evokes a stronger application of the safeguard, and there can be no case more urgently requiring it than one of the influence of a priest, director, or mother superior of a convent, on an emotional woman, residing within the convent walls, and subject to its discipline. If, therefore, the fair inference from all the facts, fairly weighed and considered together, be that Miss *Allcard* parted with her property in favour of the sisterhood by reason of the influence exercised over her as a member of the sisterhood—whether postulant, novice, or sister—the gift in my opinion, cannot stand. Nor should I think it necessary to such a conclusion to find direct evidence of influence exercised by word of mouth or gesture. Religious influence is the most subtle of all, and may well be exercised by means and channels which for other purposes might be of little avail; and the teaching of the daily life (including, of course, the rules of poverty and obedience) would be enough of itself to justify the assertion that no inmate of this convent could make a voluntary disposition of her fortune, or a considerable part of her fortune, in favour of the sisterhood which would stand, if challenged, except under advice competent and independent. This exception is important. The law does not prohibit gifts to sisterhoods by members any more than it prohibits gifts by wards to guardians or by children to parents; but where the paramount influence presumably exists it casts on the possessor of such influence the burthen of proving that the gift was free, and it holds an essential part of that proof to be that the donor had "competent independent advice." It was urged in argument that such advice must be "legal." I pointed out to Sir *Charles Russell* that this was not the language of some, at least, of the authorities, and that, in particular, it was not the language of the considered judgment of Lord Justice *Turner* in *Rhodes* v. *Bate* (1), on which reliance was placed. The answer was, that in a large number of cases (and, of course, it was intended to include the present one) the only competent advice was "legal." To that I do not assent. The advice which is more urgently required is that of a man of the world—a man of common sense—who, without despising emotion, does not rank it among the virtues, but also finds a place there for prudence. Such a man, especially if in a general way conversant with the administration of property, and capable of expressing his views clearly and strongly, would be a far better adviser than a solicitor or counsel, who did not possess these qualifications. The necessity of competent independent advice wherever that necessity occurs, is not affected by the consideration that the advice, however plainly and strongly given, would in all probability be disregarded, or, in other words, that the donee of a gift obtained by the exercise of undue influence might insist on the donor adopting this precaution (which would make the gift indubitably safe) without running any appreciable risk of loss. I agree with Sir *Charles Russell* that if, at any stage of her conventual career, Miss *Allcard* had resorted to the advice of externs, the result would have been in substance that which he so dramatically portrayed, and she would have put from her the advice received as a temptation of the evil one; but this, I repeat, cannot make the advice less necessary if otherwise required. Mr. *Warmington* argued that the principles just discussed cannot be applied to a case like the present, where a member of an association makes a gift not in favour of a stranger or another member for his or her own benefit, but to another member for the benefit of the association to which they both belong, and he challenged his opponents to find an authority in point. None has been produced. I do not the less decisively reject the argument. I can imagine a declaration of trusts placing obstacles in the way of relief, and even here the Plaintiff might have been obstructed if the Solicitor-General had thought it right to insist on the objection for want of parties taken by the 16th paragraph of the defence. But the difficulty would be one of form, and not of substance. Whenever it becomes necessary the Court will, I am satisfied, provide the means of doing justice, and not allow a gift otherwise avoidable to be sustained because religious fervour or legal ingenuity has devoted it to pious purposes instead of to the worldly benefit of individuals. The Court is ever unwilling to interfere with innocent third parties, but, after all, they are in

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(1) Law Rep. 1 Ch. 252.

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the case supposed mere volunteers, and can assert no rights stronger than those through whom they claim. This is really involved in Lord *Eldon's* judgment in *Huguenin* v. *Baseley* (1). He says (2): "I should regret, that any doubt could be entertained, whether it is not competent to a Court of Equity to take away from third persons the benefits, which they have derived from the fraud, imposition, or undue influence of others. The case of *Bridgman* v. *Green* (3) is an express authority, that it is within the reach of the principle of this Court to declare, that interests, so gained, by third persons, cannot possibly be held by them; and Lord *Hardwicke* observes justly, that, if a person could get out of the reach of the doctrine and principle of this Court by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud." The principles which I have endeavoured to explain will, I think, be found consistent with the many authorities cited in argument, including those to which I have already referred, and also *Hoghton* v. *Hoghton* (4), where Lord *Romilly* (5) uses language which may with advantage be quoted. After saying, in Lord *Eldon's* words taken from *Huguenin* v. *Baseley*, "The question is not whether the donor knew what he was doing, but how the intention was produced," he adds, "and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction would be set aside." There were two cases cited from the Irish Equity Reports. The first, *Whyte* v. *Meade* (6), was a convent case, and in that respect in point here; but, on the other hand, it was a case of fraud by way of breach of contract, and therefore not a good illustration of the general principle on which gifts are avoided for undue influence. Here everything was done regularly in the sense of being done according to the rules of the sisterhood and to the plan to which Miss *Allcard* had submitted. The distinction between the two cases is not unimportant. The other case—*M'Carthy* v. *M'Carthy* (7)—reported in the House of Lords under

(1) 14 Ves. 273.
(2) Ibid. 289.
(3) 2 Ves. Sen. 627; Wilm. 58.
(4) 15 Beav. 278.
(5) Ibid. 299.
(6) 2 Ir. Eq. Rep. 420.
(7) 9 Ir. Eq. Rep. 620.

the name of *Fulham* v. *McCarthy* (1)—is really of no value at all. The Lord Chancellor of *Ireland* (who, I see, was not Lord *St. Leonards*) had made a strange decree for somewhat strange reasons, and it was reversed in the House of Lords without discussion of the merits of the case. Lord *Brougham*, it is true, referred to a question said by him to be one of difficulty, which is not foreign to the present case, but he did so only for the purpose of saying that he would not express any opinion on it.

With this statement of principles and this comment on the authorities, I have to consider how they ought to be applied to the present case, but before doing so I must briefly continue the narrative of the Plaintiff's life, in order thoroughly to explain her position. As already stated, she left the convent on the 9th of May, 1879, and was received into the *Church of Rome* on the 16th of the same month. It seems that she immediately consulted her brother, the trustee of her father's will, who had corresponded with her throughout her convent life, and in whom, obviously and with reason, she placed much confidence. She told him that she had executed a will in favour of the sisterhood, and at her request he prepared for her another, which she then executed, merely revoking the first. She must have told him that the remittances made by him to her at the convent were in the hands of the sisterhood, and asked his advice respecting them. Whether he advised her not to trouble herself about it, or simply declined to trouble himself, I am not sure; but about the same time she consulted a priest of her newly adopted faith, and was advised by him not to trouble herself. Upon this advice she acted. On the 19th of May, 1879, and again on the 21st of May, 1879, and even a third time on the 14th of June, 1879, Miss *Allcard* wrote to Miss *Skinner*, whom she still addressed in terms of affection and respect, and asked to have returned to her the will which she had executed at the convent, and which had become useless. It seems that Miss *Skinner* and Miss *Allcard* were both under the impression that the latter had executed a deed of gift. This turns out not to be the case; but the impression was valuable as evoking from Miss *Allcard* a remarkable statement of the difference between a will and a deed. It is possible to put more than one construction on the letter of the 14th of June, 1879, in which this statement occurs, but on any construction it plainly shews that she knew that she had bestowed on the convent property to which the will had no application, and that a revocation of the gift of such property was not possible by a mere act of her own, as was the revocation of her will. Miss *Allcard* did not consult a solicitor until January or February, 1880. She then consulted Mr. *Blount*, her solicitor in the present action, who made a will for her. She was not capable of giving Mr. *Blount* such information respecting her property as a solicitor would naturally require in order to prepare a complete will, and for that purpose he had to obtain a copy of the father's will and full information respecting the estate; I do not, however, treat this as of much importance. I think she knew generally what her property was and whence it was derived, and that she was able without difficulty to tell Mr. *Blount* whence further and fuller information could be obtained. There is a question on the evidence whether Mr. *Blount* heard at this time of Miss *Allcard* having given large sums to the convent. She says that she told him the amount given, and that he remarked that it was a large sum to leave behind. He does not remember the circumstance, and thinks it unlikely that he made any remark of the kind. Without in the least doubting his word, I treat Miss *Allcard's* statement as the true one. It is more consistent with the other facts of the case, and I think she is more likely to have remembered with accuracy what took place than he was, bearing in mind that the property in question was a matter with which he had then no concern. She had been advised to take no trouble about it, and told him that she intended to act on that advice. Mr. *Blount* saw Miss *Allcard* several times between the interviews of January and February, 1880, and the 12th of November, 1884, but it was not until then that the claim in the present action was suggested. It was then suggested because Miss *Merriman*, a sister who, like Miss *Allcard*, had quitted the convent, had claimed a return of her money and had obtained it. Even so late as the 25th of April, 1884, Miss *Allcard* had written to Miss *Skinner* demanding merely the will, but now she determined to ask more. In March, 1885, the claim in this action was formally made, and on the 26th of August, 1885, the writ was issued. Taking the former rather than the latter of those two dates as the commencement of litigation, was it too late for Miss *Allcard* to assert her rights, assuming them to be well founded? I might avoid the decision of this question, but having regard to the importance attributed to it during the argument, I do not think that this would be satisfactory to the parties or otherwise convenient, and I therefore will dispose of it before proceeding further. The objection to Miss *Allcard's* claim from this point of view is, that it was barred by laches or acquiescence. It would be difficult in such a case as this, or indeed in any case, to settle definitely a period delay during which would be a conclusive bar to a plaintiff's claim, and certainly here the period was not long. On the other hand, a brief delay might be sufficient under special circumstances, or with reference to property of a special kind. In cases of constructive trust one must take into account both the nature of the right which is claimed, and the nature of the property in which it is claimed. (See the judgment of Lord Justice *Turner* in *Clegg* v. *Edmondson* (1).) I take the equitable rule to be well stated in the judgment of the Privy Council in *Lindsay Petroleum Company* v. *Hurd* (2). But the rule has no application except from the time when the party against whom it is sought to apply it was sufficiently acquainted with his rights to enable him to assert them, and, when those rights are to avoid gifts obtained by undue influence, free from that influence. When, if ever, before the 12th of November, 1884, was Miss *Allcard* in that position? I hold that she was in that position in May, 1879. She certainly was free from any undue influence, at least on the side of the convent and its rules, for she had joined the *Church of Rome* and had consulted a priest of that Church, and I think that she was sufficiently acquainted with her rights. This is, to my mind, sufficiently proved by the letters written by her and the facts in evidence after her leaving the convent, to which I have already referred; and I think, too, that her mind must be taken to have reverted in May, 1879, to the knowledge which she possessed before she joined the convent, and that, even excluding all the letters written to her by her brother while there as either not read, or at any rate carelessly treated by her, I think that she knew enough about her property and was sufficiently alive to her legal position to justify the conclusion that in May, 1879, she deliberately determined to leave the property which she had then already given to the convent where probably her conscience told her she was in honour bound to leave it. She knew that money had been spent and was being spent freely on the work in which she had been engaged. She knew that she could not withdraw any part of hers without at least embarrassing the progress of that work, and, knowing that, she determined not to withdraw it; and I think that in substance she communicated that determination to Miss *Skinner* in her letter of the 14th of June, 1879. The most that I could have done as regards the property other than two sums of stock presently to be mentioned would have been to direct an account to be taken according to the principles of *Pennell* v. *Deffell* (1), but I consider myself in accord alike with *Savery* v. *King* (2), which was relied on for the Plaintiff, and *Wright* v. *Vanderplank* (3), the judgment of Lord Justice *Turner* in which (4) was quoted by Lord *Selborne* in *Mitchell* v. *Homfray* (5), in holding that, having regard to all the circumstances of the case—including, of course, the circumstance that Miss *Alleard's* money was contributed from time to time in varying sums—she is debarred by acquiescence from prosecuting the claim now set up as regards gifts of cheques or cash. This, however, does not include the *Midland Railway* stock and *Caledonian Railway* stock standing in Miss *Skinner's* name, dealings with which have been stayed by the institution of these proceedings. I think that if a plaintiff once establishes a claim to a trust fund, and that trust fund is ear-marked, and can be properly said to be still in existence and not specifically appropriated to any particular purpose, the claim of the *cestuis que trustent* must hold good notwithstanding any delay, laches, or acquiescence. I have said that Miss *Allcard,* in May, 1879, determined not to recall her gifts, and that she communicated that determination to Miss *Skinner*; but it would be going too far, in my judgment, to attribute to that determination, or the communication of it, the character of a release so as to debar Miss *Allcard* from subsequently claiming property still *in specie*. If Miss *Allcard* can maintain this action at all, it is because by reason of undue influence, proved to be the motive of her gifts, the relation of trustee and *cestui que trust* has been established, and the railway stocks are part of a trust fund.

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(1) 1 H. L. C. 703.

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(1) 8 D. M. & G. 787, 808.

(2) Law Rep. 5 P. C. 221.

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(1) 4 D. M. & G. 372.
(2) 5 H. L. C. 627.
(3) 8 D. M. & G. 133.
(4) Ibid. 143.
(5) 8 Q. B. D. 587.

This brings me face to face with the great question in this action—viz., whether Miss *Allcard* is, having regard to all the circumstances, entitled to any relief at all. I need not repeat the story of Miss *Allcard's* introduction to the sisterhood and her association with it; but I wish for the present purpose to examine it with the aid of strong lights thrown on it by (1) the oral evidence, and (2) the correspondence. Of the oral evidence the most important is that of Miss *Allcard* herself. She gave her evidence on the whole well; and occasional exaggeration and anxiety to befriend her own case must not prevent my regarding it as on the whole truthful. Though, as I have said, an emotional woman, she gave her evidence calmly and shewed no lack of memory. Above all, she satisfied me that she possessed intelligence, educated intelligence above the average, which, after making due allowance for the experience of the last nineteen years, must have been a powerful factor in the solution of the practical questions which she had to consider in 1868, 1869, and 1870. Perhaps she acted rashly in associating herself with Miss *Skinner* in charitable work; perhaps there were domestic troubles which threw a shadow on the comforts of home and independence; but that Miss *Allcard* appreciated the full meaning of devotion to the poor and a life of hard work in two or three cramped rooms in a model lodging-house, over a drain, and realized that in joining the sisterhood she would "forsake all," no one who, having watched her in the witness-box, construes her evidence by the admitted facts of the case can for a moment doubt. Unfortunately, she was not asked about any promise to Mr. *Nihill*, and her promise is supported by the evidence of that gentleman alone. But he distinctly stated—and there is not the slightest reason for doubting his perfect accuracy—that before coming into the house—that is, I understand, before becoming a postulant—Miss *Allcard* promised to bring money in, and said that she had made known to her relations (against whose advice she was acting) her intention of giving all she had to the work. This is not merely consistent with the admitted facts; any contradictory statement would be inconsistent with them. The view presented by Miss *Allcard's* evidence is confirmed by the correspondence. It consists of two parts, each of which has its own value. Let me first turn to Miss *Allcard's* letters from her brother, ranging from the 15th of July, 1871, to the 24th of January, 1879. When the first of these letters was received Miss *Allcard* was a novice and on the eve of admission to full membership. She was throughout the period subject to the convent influence, and, without pausing to dissect the evidence on the point, I will assume that she never saw her letters until they had been opened and read by Miss *Skinner*, who took out cheques, dividend warrants, and the like: that she read them, if at all, carelessly, as referring to matters with which she had no personal concern; and that such replies as were sent were dictated by Miss *Skinner*. But the value of the letters is this. Her brother, who did not know how his letters were treated, but who did know what information Miss *Allcard* had, and with what intelligence she had digested it when still at home, writes to his sister as to a woman well-informed respecting the matter in hand, and capable of appreciating and forming a decision on matters of business. The first letter is, perhaps, the most significant, but the others are of like character. He expresses sorrow "that the distribution of the money that became due when *Fred.* attained twenty-one had been so long delayed," and he takes the opportunity of "reminding her of the state of affairs." He mentions the investment of £5000, to the income only of which she was entitled, and states with legal accuracy her interest in her share of residue. Then he asks for directions respecting mode of payment. He treated her as well informed: why should I do otherwise? Miss *Allcard's* letters are not less instructive. Many of them in my copy are undated, but, with an exception to be presently noticed, most if not all of them must have been written after she became a novice, and probably after she became a full member. They are all addressed to Miss *Skinner*. One letter is dated the 20th of January, 1870, and is written from *Thomas's Hotel*. This was after eighteen months' experience as an associate, and immediately before she became a postulant. In this letter, of high tone and well expressed, she refers to the difficulties, not then mentioned, I conclude, for the first time, which had beset her at home. She speaks of "what she had now determined to do," and of "entering the religious life," and quotes a kind letter from one brother (not the trustee) heartily approving "what she was going to do." What was she going to do? What had she now determined to do? Was it merely to devote herself to convent work until she was tired of it? Was it merely to contribute such sums as the exigencies of the moment suggested to the relief of the poor, reserving the bulk of her fortune as a provision for comfort in later life? I cannot think so. The other letters, of equally high tone, and all written by a well-educated lady, shew that she knew and had present to her mind what she had done. She alludes, for instance, to begging from her own family, and (letter of the 16th of August, 1875) expresses her thankfulness "whenever any of their money comes to the convent." There is not an allusion to any possible gift by herself. That was a thing of the past. I agree that knowledge of what she had done or was doing, if attributed only to the period when she was subject to convent influence, will not avail without proof of intelligent intention. I have referred to it not for that purpose, but in order to confirm the view that Miss *Allcard* had that intelligent intention combined with the necessary knowledge when she first joined the sisterhood, and while she still had the advantage of competent external advice. If this be the right view, the indorsement of cheques and dividend warrants, the execution of transfers, and even the writing letters of assent to modes of investment or payment were simply ministerial acts required to perfect a gift already made, but not demanding any exercise of personal will or judgment. This brings me to the last question. Was Miss *Skinner*, as representing the sisterhood, bound on each occasion to insist for her own safety, as well as for the protection of Miss *Allcard*, that the latter should have "competent independent advice?" If she ought to have done so on any one occasion she ought to have done it always. Each cheque,

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each dividend warrant, each transfer was, in this point of view, a separate transaction requiring the like precaution, the like safeguards. My answer to this question assumes that Miss *Allcard* had already, before she joined or at the time of joining the sisterhood, devoted her fortune to it, and that she had done this in full possession of her faculties, and in the exercise of deliberate unrestrained intention. The gift was voluntary, legally incomplete, and, with deference to Lord *Brougham's* doubt, not enforceable. But the object of competent independent advice would have been to ascertain the intention, and there was, in my opinion, no reason for ascertaining it in matters of detail when it had been sufficiently concluded and expressed as regards the whole of Miss *Allcard's* available fortune. I have had to consider by which of two principles this case ought to be governed. One principle is that those whom English law regards as *sui juris*, men and unmarried women over twenty-one and of sound mind and understanding, are unfettered in their disposition of their own property in favour of any object allowed by law. The other is, that any person of either sex, and of whatever age, is entitled to be protected against undue influence of whatever character, and is entitled to avoid voluntary gifts made under such circumstances that undue influence must be presumed to have existed, and its exercise has not been disproved. I have endeavoured, to the best of my ability, to treat this as a question of law, regardless of feelings which might otherwise sway the judgment, and, so far as I could control thoughts or command language, I have endeavoured to express my conclusions so as to avoid wounding susceptibilities or causing pain to any person directly or indirectly interested in the matter in hand. The two railway companies (formal Defendants) were disposed of at the outset, on the undertaking of the Plaintiff to pay their costs in any event. My judgment therefore concerns only the Plaintiff and the Defendant Miss *Skinner*, and it is for the Defendant with costs.

H. L. F.

C. A.

From this judgment so far as it related to the two sums of railway stock still standing in Miss *Skinner's* name and the dividends since the Plaintiff left the sisterhood, the Plaintiff appealed. The appeal came on for hearing on the 13th of May, 1887.

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Sir *Horace Davey*, Q.C., *Finlay*, Q.C., and *F. B. Palmer*, for the Appellant.

Sir *E. Clarke*, S.G., *Warmington*, Q.C., and *E. Ford*, for the Defendant *Skinner*.

Haldane, and *Sargant*, for the Railway Companies.

Finlay, in reply.

1887. July 9. COTTON, L.J.:—

This was an action brought to set aside gifts made by the Plaintiff to the Defendant, Miss *Skinner*, while the Plaintiff was member of a sisterhood of which the Defendant was the lady superior. Mr. Justice *Kekewich* dismissed the action with costs. The Plaintiff, by her action, sought to recover two sums of stock transferred by her to the Defendant in the year 1874, which still remained in the name of the Defendant, and also all moneys other than annual income which had been from time to time given by the Plaintiff to the Defendant, and which had been expended by the Defendant for the charitable purposes in which the Plaintiff and the other members of the sisterhood had been engaged. On the appeal the claim of the Plaintiff was confined to the sums of stock still remaining in the name of the Defendant.

The history of the case begins in the year 1868. At that time the Defendant, Miss *Skinner*, was the lady superior of an institution or sisterhood, which was an association of ladies who devoted themselves to works of charity, with the assistance and under the spiritual direction of the Rev. Mr. *Nihill*, who was the vicar of *St. Michael's, Mark Street, Finsbury*. In 1868 the Plaintiff, who was then residing with her mother, became an associate of the sisterhood, and joined in the charitable work in which they were engaged, but did not reside with them. However, in January, 1870, she became a postulant, in April of that year, a novice, and in August, 1871, she became a professed sister, and as such took the vows. I understand that at this time the rules which are in evidence had not been reduced into writing, but it is conceded that the principles on which the sisterhood was conducted were the same as those afterwards expressed in the rules, and that the rules may be considered as expressing in detail the vows of poverty, chastity, and obedience which the Plaintiff took when she became a professed sister. Though the vow of poverty required that a sister should not hold any property, yet neither the vow nor the rules required that the property owned by any sister before she became professed should be made over to the superior or to the sisterhood. The obedience was to be rendered to the superior, but although it is necessary that a sister should be obedient to the orders of the superior in any work like that in which the sisterhood was engaged, yet I cannot but express my doubt as to the propriety of the absolute submission required by the rules to the will of the superior, and I regret the terms in which the rules expressed the obedience which was required. Certainly the rules imposed the most absolute submission by the sisters to the superior, and prevented a sister from obtaining without leave the advice or counsel of any person not connected with the sisterhood. After the Plaintiff became a professed sister she from time to time handed over to the Defendant the income to which she was entitled under her father's will, and also the capital moneys, as she was entitled to receive them, under that will. The capital moneys amounted to about £8000, and of this she handed over to the Defendant sums exceeding £7000, of which the sums of stock amounting to £500 ordinary stock of the *Midland Railway Company* and £1171 four per cent. *Caledonian Railway* stock still remaining in the hands of the Defendant are part. The remainder had been expended for the purposes of the sisterhood before the action was brought. The stock was transferred by the Plaintiff in the year 1874. It is probable that this is a portion of the father's estate which was then divisible. There is no evidence as to what took place at the time when the transfer was in fact made. It was urged by the Defendant's counsel that there is no difference between the claim of the Plaintiff to the stock remaining and her claim to the moneys given by her to the Defendant and applied by her to the purposes of the sisterhood. If the money so expended had been applied by the transferee for her own selfish purposes, or had been obtained by fraud or deception on the part of the donee, probably this would have been the case. But if the Plaintiff has an equity to set aside gifts made to the Defendant, in my opinion the Defendant would have a stronger equity against the Plaintiff to prevent her from making the Defendant personally liable for money spent for the charitable purposes to promote which the Plaintiff and Defendant were at the time of the expenditure associated, and which the Plaintiff was at the time willing and anxious to promote.

Is the Plaintiff entitled to recall the stock now in question and still in hand? There is no decision in point with reference to a case like the present. For, although in the case of *Whyte* v. *Meade* (1) a deed of gift by a nun was set aside, there were in that case special circumstances which prevent it being treated as an authority in favour of the Plaintiff. The question is—Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes—First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.

(1) 2 Ir. Eq. Rep. 420.

Both the Defendant and Mr. *Nihill* have stated that they used no influence to induce the Plaintiff to make the gift in question, and there is no suggestion that the Defendant acted from any selfish motive, and it cannot be contended that this case comes under the first class of decisions to which I have referred. The question is whether the case comes within the principle of the second class, and I am of opinion that it does. At the time of the gift the Plaintiff was a professed sister, and, as such, bound to render absolute submission to the Defendant as superior of the sisterhood. She had no power to obtain independent advice, she was in such a position that she could not freely exercise her own will as to the disposal of her property, and she must be considered as being (to use the words of Lord Justice *Knight Bruce* in *Wright* v. *Vanderplank* (1)) "not, in the largest and amplest sense of the term—not, in mind as well as person—an entirely free agent." We have nothing to do with the Plaintiff's reasons for leaving the sisterhood; but, in my opinion, when she exercised her legal right to do this she was entitled to recover so much of the fund transferred by her as remained in the hands of the Defendant, on the ground that it was property the beneficial interest in which she had never effectually parted with. But it was urged that it would be contrary to public policy to grant the Plaintiff relief, on the ground that it would be a hindrance to the charitable work in which the Plaintiff and the sisterhood were engaged, and that it would be better to shew those who were desirous of leaving the work that they could not take with them any part of their property. But in my opinion it would be wrong to put such pressure on those who may wish to leave. Such work to be effectual must be done with a willing mind, and in my opinion it would be productive of evil to attempt to retain in such a society as the sisterhood, by the pressure of loss of property, those whose hearts and will are no longer in the work, and who desire to exercise their legal right of withdrawing.

But it is contended, and Mr. Justice *Kekewich* decided against the Plaintiff on this ground, that she had competent advice, that of her brother, before she joined the sisterhood, and that she then formed the resolution (as Mr. *Nihill* stated in his evidence) to give everything to the sisterhood, and that this prevents the subsequent transfer being set aside. In my opinion, even if there were evidence that she had, before she joined the sisterhood, advice on the question of how she should deal with her property, that would not be sufficient. The question is, I think, whether at the time when she executed the transfer she was under such influences as to prevent the gift being considered as that of one free to determine what should be done with her property. No reliance can be placed on the promise made to Mr. *Nihill*. This could not be enforced, and did not in any way bind her in law, or pass the property; and the title of the Defendant depends solely on the transfer made in 1874. In my opinion, when the Plaintiff left the sisterhood in 1879, she was entitled to set aside the transfer, and to have re-transferred to her the fund still held by the Defendant. Has she lost this right by delay?

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(1) 8 D. M. & G. 137.

This case is not like that of a contract voidable for fraud. There the party defrauded must elect, and within a reasonable time, for till he does so he retains the right or the benefits, however inadequate, secured to him by the contract. It is to such a case that the judgment of the Court in *Clough* v. *London and North Western Railway Company* (1) applies, and not to a case of voluntary gift like the present, where the person seeking to set aside the transfer never received any benefit whatever from the transaction.

There was an attempt to shew that in consequence of the Plaintiff's delay in bringing the action the Defendant and the sisterhood, which she represents, had incurred liabilities on the faith of retaining the money given by the Plaintiff. But I can find no evidence to support this contention. Mr. *Ford* contended that in 1883 a lease was taken for the sisterhood at a rent exceeding that for which it had been previously liable. But the lease, if it was of the suggested date, is not in evidence, and the evidence attributes the taking of a larger piece of land at the increased rent to the reliance of Mr. *Nihill* on the expectation formed in 1870 or 1871, based on the Plaintiff's promises, that she would give her property to the sisterhood. This defence, in my opinion, fails.

(1) Law Rep. 7 Ex. 26.

Is the delay (and in this case it was very great) of itself sufficient to deprive the Plaintiff of her right to the fund now in the Defendant's hands? The Defendant has not pleaded the *Statute of Limitations*, and I do not suggest that she could successfully have done so. In cases where the fact of influence depends on the result of conflicting evidence, delay must be important, but it cannot be disputed that the Plaintiff was in a state which necessarily subjected her to a powerful influence. The proof of this does not depend on parol evidence, but on the rules and admitted principles of the sisterhood. Mere delay in enforcing a right is not itself a defence. It is very different from raising no objection to an act while it is being done, which may be treated as assent to the act, and therefore as being acquiesced in in such a sense as to be an equitable defence. The judgment of Lord Justice *Thesiger* in *De Bussche* v. *Alt* (1) is in point. In *Wright* v. *Vanderplank* (2), which was much relied upon as regards delay, the action was not brought until ten years after the execution of the deed sought to be set aside, yet Lord Justice *Turner* says (3): "As to the time which has elapsed, if the case had rested on time only, much might have been said in favour of the plaintiff's claim," and in dismissing the action he relied on the way in which the donor had during the period subsequent to the execution of the deed dealt with the property as recognising the deed as effectual. Moreover, delay in asserting rights cannot be in equity a defence unless the Plaintiff were aware of her rights. In her evidence she stated that till long after 1879 she did not know that she could set aside the gift. A letter of June, 1879, was relied on to displace this statement. But the terms of that letter, though apparently inconsistent with her evidence, are ambiguous, and the letter was not put to her in cross-examination. Also it was in evidence that shortly after she left the sisterhood she had some conversation with her brother about her money and with a Roman Catholic priest, who advised her not to trouble herself about it, and also that shortly after she left the sisterhood she consulted with a solicitor as to making a fresh will, and that he told her "it was too much money to leave behind her." But I understand that Mr. Justice *Kekewich* did not discredit her evidence as to the time when she first was informed of her right to set aside the gifts to the Defendant, and I think that we ought to hold she did not till long after 1879 know her rights.

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(1) 8 Ch. D. 286.

(2) 8 D. M. & G. 133.

(3) 8 D. M. & G. 149.

The delay which has occurred since 1879 is, I think, a defence against any claim on behalf of the Plaintiff to the dividends on the stock in the name of the Defendant before the commencement of the action. But in my opinion it is no defence as regards the stock remaining in the hands of the Defendant and the dividends accrued since the commencement of the action. At the time when the Plaintiff left the sisterhood in 1879 that stock was property which the Plaintiff was entitled to claim, as being held by the Defendant in trust for her. The delay in this case does not, in my opinion, amount to evidence that the Plaintiff recognised the gift as her own spontaneous act, and in my opinion it cannot be relied upon as having deprived the Defendant of any evidence in her favour which could have been adduced if the Plaintiff had brought her action shortly after she left the sisterhood. In my opinion the Plaintiff is entitled to a decree for retransfer to her of the stock in question and for payment of the dividends accrued since the commencement of the action.

LINDLEY, L.J. :—

In 1867 the Plaintiff was living with her mother in *London*, and on the recommendation of some clergymen the Plaintiff went to the Rev. Mr. *Nihill*, vicar of *St. Michael's*, *Finsbury*, for confession, and she asked him for work in his parish of *Shoreditch*. By him she was introduced to the Defendant Miss *Skinner*, who was then and is still the lady superior of the sisterhood of *St. Mary at the Cross*.

Shortly afterwards, that is, in 1868 the Plaintiff joined the sisterhood as an associate; and about this time she promised to devote her property to the service of the poor. She explained to him that she had not much property then but that she would have more, and she said she would bring all into the sisterhood. This promise Mr. *Nihill* tells us he considered binding upon her in conscience; and it is plain that the Plaintiff herself so considered it. But this promise was purely gratuitous, and it does not appear that the Plaintiff ever knew that the promise in question was not binding upon her in point of law; and her evidence shews that she did not realize its full meaning or the position she would find herself in if she should ever desire to leave the sisterhood. Such an event never occurred to her as one which could ever happen.

In 1870 the Plaintiff became a postulant, and later in the same year a novice, and finally in August, 1871, a sister. Each of these steps was accompanied by religious services and bound the Plaintiff more and more closely to the sisterhood, and alienated her more and more from the world at large.

When the Plaintiff became a postulant she ceased to reside with her mother and resided with the sisterhood, and whilst a postulant the Plaintiff made a will by which she left the whole of her property to the sisterhood. This was done at the request of the lady superior. The will when made was laid upon the altar and was regarded as a consecrated document. Why is not explained, and is left to inference. The only reason I can suggest for such a step is that it was intended to impress on the Plaintiff that she was doing a very solemn thing, and one which was never to be undone. The will, laid upon the altar and consecrated, would, I imagine, cease to be regarded by the Plaintiff and the lady superior as a revocable instrument.

The Plaintiff was twenty-seven years of age, or thereabouts, when she first joined the sisterhood. She sought Mr. *Nihill*: he did not seek her. She wished to join the sisterhood, and she was resolved to devote herself and her property to it and to charitable work. This wish and determination were naturally strengthened by the religious services of the sisterhood and by the influence of those around her. There is evidence that, when a novice, and before she became a sister, she wished to leave the sisterhood; but that she did not feel that she could do so, and that she felt even then bound to the sisterhood. After she became a sister she again wished to leave, but she was told by the lady superior that she could not do so, and that she was bound to the sisterhood for life. On another and later occasion she was not allowed to leave, although she wished to do so.

On becoming a sister the Plaintiff took vows of obedience to the lady superior and of poverty and chastity; and there can be no doubt that the Plaintiff regarded these vows as binding on her, not only when she took them but ever afterwards, until she finally left the sisterhood and became a Roman Catholic. On becoming a sister the Plaintiff also became subject to the rules of the sisterhood. These rules, although not reduced into their final shape until 1872 or 1873, were practically in force before, and were well known to the Plaintiff when she became a sister. The important rules are those which require (1.) Implicit obedience to the lady superior; (2.) Poverty. A third rule (No. xxxi.) is thus worded: "Let no sister seek advice of any extern without the superior's leave."

The vow of poverty and the rule as to poverty obliged each sister to give away all her property. But the rule did not require her to give it, or any of it, to the sisterhood. She could give it to her relations or to the poor if she wished. But it would be idle to suppose that a sister would not feel that she ought to give some of her property at least to the sisterhood; and it would be equally idle to suppose that she would not be expected to do so.

The forms of deeds in the Schedules A and B to the rules are very significant. The donee is inserted as "——— her heirs, executors, administrators, and assigns." The introduction of *her* is very unusual in a legal form, and shews plainly enough who the donee was expected to be. Further, the deeds when filled up are by the rules to be placed on the altar, in order, I suppose, to add to their solemnity, and impress the donor with a sense of their irrevocability. The Plaintiff never executed any such deed as was contemplated by the rules; but they and the schedules shew what was expected to be done. In this particular case, moreover, the Plaintiff had expressly promised to give all she had to the sisterhood, and Mr. *Nihill* tells us that non-performance of this promise would have been regarded as dishonourable.

The vow and rule obliging to implicit obedience to the lady superior, and the exhortation or command to regard her voice as the voice of God, produce very different effects on different minds. There can, however, be no question that the Plaintiff felt bound by the vow and by the rule until she emancipated herself from both of them, which she did when she left the sisterhood.

It is important, however, to bear in mind that the fetter thus placed on the Plaintiff was the result of her own free choice. There is no evidence that pressure was put upon her to enter upon the mode of life which she adopted. She chose it as the best for herself; she devoted herself to it, heart and soul; she was, to use her own expression, infatuated with the life and with the work. But though infatuated, there is no evidence to shew that she was in such a state of mental imbecility as to justify the inference that she was unable to take care of herself or to manage her own affairs.

The rule against obtaining advice from externs without the consent of the lady superior invites great suspicion. It is evidently a rule capable of being used in a very tyrannical way, and so as to result in intolerable oppression. I have carefully examined the evidence to see how this rule practically worked, but I can find nothing on the subject. I can find nothing to shew one way or the other what would have been the effect, for example, of a request for leave to consult a friend, or to obtain legal or other advice respecting any disposition of property, or respecting leaving the sisterhood. There, however, is the rule, and a very important one it is. I shall have occasion to refer to it again hereafter. Such being the nature of the vows and rules which the Plaintiff had taken, and to which she had submitted herself, and by which she felt herself bound by the highest religious sanctions, it is necessary to examine what she did with her property, and the circumstances under which she gave it to the sisterhood.

The evidence shews that her brother, who was one of her trustees, kept her fully informed of what her property consisted of, and he remitted to her from time to time cheques and transfers of railway stock and other securities to which she was entitled. The brother's letters and the cheques and transfers all passed through the hands of the lady superior, it being the rule that she should see all letters to sisters. The Plaintiff gave all the cheques to the lady superior, after indorsing them, and also transferred to her all the railway stock and securities as they were received. The cheques were handed over to Mr. *Nihill*, who was the treasurer of the sisterhood, and were paid by him into a bank to an account kept in his own name, and on which he alone could draw. The sisterhood was building an hospital in which the Plaintiff took great interest, and most of the Plaintiff's money was spent in defraying the expenses of the building. I have examined the evidence with care in order to see whether any pressure was put upon the Plaintiff in order to induce her to give her property to the sisterhood, or whether any deception was practised upon her, or whether any unfair advantage was taken of her, or whether any of her money was applied otherwise than *bonâ fide* for the objects of the sisterhood, or for any purpose which the Plaintiff could disapprove. The result of the evidence convinces me that no pressure, except the inevitable pressure of the vows and rules, was brought to bear on the Plaintiff; that no deception was practised upon her; that no unfair advantage was taken of her; that none of her money was obtained or applied for any purpose other than the legitimate objects of the sisterhood. Not a farthing of it was either obtained or applied for the private advantage of the lady superior or Mr. *Nihill;* nor indeed did the Plaintiff ever suggest that such had been the case. The real truth is that the Plaintiff gave away her property as a matter of course, and without seriously thinking of the consequences to herself. She had devoted herself and her fortune to the sisterhood, and it never occurred to her that she should ever wish to leave the sisterhood or desire to have her money back. In giving away her property as she did she was merely acting up to her promise and vow and the rule of the sisterhood, and to the standard of duty which she had erected for herself under the influences and circumstances already stated.

In May, 1879, the Plaintiff left the sisterhood, and on the 16th of that month she was received into the Roman Catholic Church, and she then regarded herself as freed from the vows she had taken on joining the sisterhood. Soon after she had left the sisterhood the Plaintiff had some conversation with her brother about getting her money back, and he said he did not want the trouble, and she had better leave it alone. She was also advised by a Roman Catholic priest not to trouble about it. In February, 1880, she consulted her present solicitor about making a new will, and she then had some conversation with him about the money she had given to the sisterhood, and he told her it was too large a sum to leave behind without asking for it back, and she said she would not trouble about it. Some time in 1884 the Plaintiff heard that another sister, a Miss *Merriman*, had left the sisterhood, and had asked for her money back, and had had it returned to her, and then the Plaintiff made up her mind to try and get her money back. Upon her re-examination by Sir *C. Russell*, the Plaintiff said that she had no idea that she could get it back until after she had heard that Miss *Merriman* had recovered hers. But the evidence already alluded to shews clearly that she had considered the matter, and had come to the conclusion that it was not worth troubling about. As a matter of fact, although she asked the lady superior in 1880 to give her back her will, she never asked for any of her money back until 1884, more than five years after she had left the sisterhood, and the present action was not brought until the 20th of August, 1885.

By her action the Plaintiff sought to recover the whole of the money back which she had given to the sisterhood, amounting to nearly £8500. Mr. Justice *Kekewich* tried the action, and gave judgment for the Defendant. From this judgment the Plaintiff has appealed, but she has limited her appeal to two sums of £500 and £1171, railway stock transferred by her to the lady superior, and still standing in her name.

Two questions are raised by the appeal, namely, 1st, Whether the gifts made by the Plaintiff to the sisterhood were revocable or irrevocable when made? 2nd, Whether, assuming them to have been revocable when made, it was competent for the Plaintiff to revoke them when she did?

The first question is one of great importance and difficulty. Its solution requires a careful consideration of the legal effect of gifts by persons of mature age who feel bound by vows and rules to give away their property, but who have taken the vows and submitted to the rules voluntarily and without pressure, and who are subject to no other coercion or influence than necessarily result from the vows and rules themselves, and from the state of their own mind.

There is no statutory law in this country prohibiting such

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gifts unless what is given is land or money to be laid out in land. These are provided for by the *Mortmain* and *Charitable Uses* Acts. But they have no application to this case. The common law, as distinguished from equity, does not invalidate such gifts as these. There being no duress or fraud, the only ground for impeaching such gifts at law would be want of capacity on the part of the donor; and although the Plaintiff was a religious enthusiast, no one could treat her as in point of law *non compos mentis.* There is no authority whatever for saying that her gifts were invalid at law. It is to the doctrines of equity, then, that recourse must be had to invalidate such gifts, if they are to be invalidated. The doctrine relied upon by the Appellant is the doctrine of undue influence expounded and enforced in *Huguenin* v. *Baseley* (1) and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap.

First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. *Norton* v. *Relly* (2), *Nottidge* v. *Prince* (3), *Lyon* v. *Home* (4), and *Whyte* v. *Meade* (5), all belong to this group. In *Whyte* v. *Meade* a gift to a convent was set aside, but the gift was the result of coercion, clearly proved. The evidence does not bring this case within this group.

The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made. *Huguenin* v. *Baseley* was a case of

(1) 14 Ves. 273.
(2) 2 Eden. 286.
(3) 2 Giff. 246.
(4) Law Rep. 6 Eq. 655.
(5) 2 Ir. Eq. Rep. 420.

this kind. The defendant had not only acquired considerable spiritual influence over the plaintiff, but was intrusted by her with the management of her property. His duty to her was clear, and it was with reference to persons so situated that Lord *Eldon* used the language so often quoted and so much relied on in this case. He said (1): "Take it that she (the plaintiff) intended to give it to him (the defendant): it is by no means out of the reach of the principle. The question is, not, whether she knew, what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf." This principle has been constantly recognised and acted upon in subsequent cases, but in all of them, as in *Huguenin* v. *Baseley* (2) itself, it was the duty of the donee to advise and take care of the donor. Where there is no such duty the language of Lord *Eldon* ceases to be applicable.

Rhodes v. *Bate* (3) was determined on the same principle as *Huguenin* v. *Baseley*, the Court having come to the conclusion that the relation of the defendant to the plaintiff was really that of a solicitor to his client.

I have not been able to find any case in which a gift has been set aside on the ground of undue influence which does not fall within one or other or both of the groups above mentioned. Nor can I find any authority which actually covers the present case. But it does not follow that it is not reached by the principle on which the Court has proceeded in dealing with the cases which have already called for decision. They illustrate but do not limit the principle applied to them.

The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never

(1) 14 Ves. 299. (2) 14 Ves. 273.
(3) Law Rep. 1 Ch. 252.

set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin* v. *Baseley* (1) is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.

As no Court has ever attempted to define fraud so no Court has ever attempted to define undue influence, which includes one of its many varieties. The undue influence which Courts of Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and, failing that proof, have set aside gifts otherwise unimpeachable. In this particular case I cannot find any proof that any gift made by the Plaintiff was the result of any actual exercise of power or influence on the part of the lady superior or of Mr. *Nihill*, apart from the influence necessarily incidental to their position in the sisterhood. Everything that

(1) 14 Ves. 273.

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the Plaintiff did is in my opinion referable to her own willing submission to the vows she took and to the rules which she approved, and to her own enthusiastic devotion to the life and work of the sisterhood. This enthusiasm and devotion were nourished, strengthened and intensified by the religious services of the sisterhood and by the example and influence of those about her. But she chose the life and work; such fetters as bound her were voluntarily put upon her by herself; she could shake them off at any time had she thought fit, and had she had the courage so to do; and no unfair advantage whatever was taken of her. Under these circumstances it is going a long way to hold that she can invoke the doctrine of undue influence to save her from the consequences of her own acts, and to entitle her to avoid the gifts she made when in a state of mind different from that in which she now is. I am by no means insensible of the difficulty of going so far.

Nevertheless, consider the position in which the Plaintiff had placed herself. She had vowed poverty and obedience, and she was not at liberty to consult externs without the leave of her superior. She was not a person who treated her vows lightly; she was deeply religious and felt bound by her promise, by her vows, and by the rules of the sisterhood. She was absolutely in the power of the lady superior and Mr. *Nihill.* A gift made by her under these circumstances to the lady superior cannot in my opinion be retained by the donee. The equitable title of the donee is imperfect by reason of the influence inevitably resulting from her position, and which influence experience has taught the Courts to regard as undue. Whatever doubt I might have had on this point if there had been no rule against consulting externs, that rule in my judgment turns the scale against the Defendant. In the face of that rule the gifts made to the sisterhood cannot be supported in the absence of proof that the Plaintiff could have obtained independent advice if she wished for it, and that she knew that she would have been allowed to obtain such advice if she had desired to do so. I doubt whether the gifts could have been supported if such proof had been given, unless there was also proof that she was free to act on the advice which might be given to her. But the rule itself is so oppressive and so easily abused that any person subject to it is in my opinion brought within the class of those whom it is the duty of the Court to protect from possible imposition. The gifts cannot be supported without proof of more freedom in fact than the Plaintiff can be supposed to have actually enjoyed.

The case is brought within the principle so forcibly expressed by the late Lord Justice *Knight Bruce* in *Wright* v. *Vanderplank* (1), in which a gift by a daughter to her father was sought to be set aside. If any independent person had explained to the Plaintiff that her promise to give all her property to the sisterhood was not legally binding upon her, and that her vows of poverty and obedience had no legal validity, and that if she gave her property away and afterwards left the sisterhood she would be unable to get her property back, it is impossible to say what she might or might not have done. In fact she never had the opportunity of considering this question.

Where a gift is made to a person standing in a confidential relation to the donor, the Court will not set aside the gift if of a small amount simply on the ground that the donor had no independent advice. In such a case, some proof of the exercise of the influence of the donee must be given. The mere existence of such influence is not enough in such a case; see the observations of Lord Justice *Turner* in *Rhodes* v. *Bate* (2). But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift. So, in a case like this, a distinction might well be made between gifts of capital and gifts of income, and between gifts of moderate amount and gifts of large sums, which a person unfettered by vows and oppressive rules would not be likely to wish to make. In this case the Plaintiff gave away practically all she could, although, having a life interest in other property, she did not reduce herself to a state of poverty.

As I have already stated, I believe that in this case there was in fact no unfair or undue influence brought to bear upon the Plaintiff other than such as inevitably resulted from the training she had received, the promise she had made, the vows she had taken, and the rules to which she had submitted herself. But her gifts were in fact made under a pressure which, whilst it lasted, the Plaintiff could not resist, and were not, in my opinion, past recall when that pressure was removed. When the Plaintiff emancipated herself from the spell by which she was bound, she was entitled to invoke the aid of the Court in order to obtain the restitution from the Defendant of so much of the Plaintiff's property as had not been spent in accordance with the wishes of the Plaintiff, but remained in the hands of the Defendant. The Plaintiff now demands no more.

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(1) 8 D. M. & G. 136.

(2) Law Rep. 1 Ch. 258.

I proceed to consider the second point which arises in this case, namely, whether it is too late for the Plaintiff to invoke the assistance of the Court. More than six years had elapsed between the time when the Plaintiff left the sisterhood and the commencement of the present action. The action is not one of those to which the *Statute of Limitations* in terms applies; nor is that statute pleaded. But this action very closely resembles an action for money had and received where laches and acquiescence are relied upon as a defence: and the question is whether that defence ought to prevail. In my opinion it ought. Taking the statute as a guide, and proceeding on the principles laid down by Lord *Camden* in *Smith* v. *Clay* (1), and by Lord *Redesdale* in *Hovenden* v. *Lord Annesley* (2), the lapse of six years becomes a very material element for consideration. It is not, however, necessary to decide whether this delay alone would be a sufficient defence to the action. The case by no means rests on mere lapse of time. There is far more than inactivity and delay on the part of the Plaintiff. There is conduct amounting to confirmation of her gift. Gifts liable to be set aside by the Court on the ground of undue influence have always been treated as voidable and not void.

If authority for this proposition be wanted, such authority will be found in *Wright* v. *Vanderplank* (3) and *Mitchell* v. *Homfray* (4). Moreover, such gifts are voidable on equitable grounds only. A gift intended when made to be absolute and irrevocable, but liable to be set aside by a Court of Justice, not on the ground

(1) 3 Bro. C. C. 639, n.

(2) 2 Sch. & Lef. 607, 630.

(3) 8 D. M. & G. 133.

(4) 8 Q. B. D. 587.

of a change of mind on the part of the donor, but on grounds of public policy based upon the fact that the donor was not sufficiently free relatively to the donee, such a gift is very different from a loan which the borrower knows he is under an obligation to repay, and is also different from a gift expressly made revocable and never intended to be absolute and unconditional. A gift made in terms absolute and unconditional naturally leads the donee to regard it as his own; and the longer he is left under this impression the more difficult it is justly to deprive him of what he has naturally so regarded. So long as the relation between the donor and the donee which invalidates the gift lasts, so long is it necessary to hold that lapse of time affords no sufficient ground for refusing relief to the donor. But this necessity ceases when the relation itself comes to an end; and if the donor desires to have his gift declared invalid and set aside, he ought, in my opinion, to seek relief within a reasonable time after the removal of the influence under which the gift was made. If he does not the inference is strong, and if the lapse of time is long the inference becomes inevitable and conclusive, that the donor is content not to call the gift in question, or, in other words, that he elects not to avoid it, or, what is the same thing in effect, that he ratifies and confirms it. This view is not only conformable to the well-settled rules relating to other voidable transactions (see the judgment in *Clough* v. *London and North Western Railway Company* (1)), but is also warranted by *Wright* v. *Vanderplank* (2) and *Mitchell* v. *Homfray* (3). It is true that in those cases the donors had died; but it is clear, I think, that the decisions proceeded upon the ground that the donors, if alive, could not have obtained relief. A right to have a gift set aside for fraud or undue influence does not cease on the death of the donor but passes to his representatives; and if in *Mitchell* v. *Homfray* the donor had been entitled when he died to have his gift set aside, his executors would have succeeded to his rights, and would have obtained the relief they sought. In this particular case the Plaintiff considered when she left the sisterhood what course she should take, and she determined to do nothing, but to leave matters as they were. She insisted on having back her will, but

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(1) Law Rep. 7 Ex. 35. (2) 8 D. M. & G. 133. (3) 8 Q. B. D. 587.

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she never asked for her money until the end of five years or so after she left the sisterhood. In this state of things I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts but to acquiesce in them, or, if the expression be preferred, to ratify or confirm them. I regard this as a question of fact, and upon the evidence I can come to no other conclusion than that which I have mentioned. Moreover, by demanding her will and not her money, she made her resolution known to the Defendant.

It was urged that the Plaintiff did not know her rights until shortly before she asked for her money back. But, in the first place, I am not satisfied that the Plaintiff did not know that it was at least questionable whether the Defendant could retain the Plaintiff's money if she insisted on having it back. In the next place, if the Plaintiff did not know her rights, her ignorance was simply the result of her own resolution not to inquire into them. She knew all the facts; she was in communication with her present solicitor in 1880, his remark that "it was too large a sum to leave behind without asking for it back," was a clear intimation to her that she ought to ask for her money back, and was a distinct invitation to her to consider her rights. She declined to do so; she preferred not to trouble about it. Under these circumstances it would, in my opinion, be wrong and contrary to sound principle to give her relief on the ground that she did not know what her rights were. Ignorance which is the result of deliberate choice is no ground for equitable relief; nor is it an answer to an equitable defence based on laches and acquiescence. Again, it was urged that the Defendant has not been prejudiced by the delay, and that nothing has been done on the faith that the Plaintiff would not require her money to be returned to her. But I do not think this material. I treat the money as absolutely given to the sisterhood when the Plaintiff determined not to ask for it back, which she did in 1880. But, further, I cannot come to the conclusion that nothing has been done on the faith of the money being the property of the sisterhood. It is contrary to human nature to suppose that the Plaintiff's money was not for years regarded as the money of the sisterhood, and that the sisterhood did not act on that assumption and make their arrangements accordingly. Mr. *Nihill's* evidence satisfies me that they did so, although I do not think he shews that they took any particular step on the faith of having the particular sum now sought to be taken from them. It is not, however, in my opinion, necessary to prove so much as this. Whether the Plaintiff's conduct amounts in point of law to acquiescence or laches, or whether it amounts to an election not to avoid a voidable transaction, or whether it amounts to a ratification or a confirmation of her gifts, are questions of mere words which it is needless to discuss. In my judgment, it would not be fair or right to the Defendant to compel her now to restore the money sought to be recovered by this appeal. Nor, in my opinion, would such a result be in conformity with sound, legal, or equitable principles. Upon this ground, therefore, I am of opinion that this appeal ought to be dismissed.

BOWEN, L.J.:—

This is a case of great importance. There are no authorities which govern it; my brethren, on whose experience in matters of equity I naturally should rely, differ, and on that ground I have thought it right to express my own views upon the point. It is a question which must be decided upon broad principles, and we have to consider what is the principle, and what is the limitation of the principle, as to voluntary gifts where there is no fraud on the part of the Defendant, but where there is an all-powerful religious influence which disturbs the independent judgment of one of the parties, and subordinates for all worldly purposes the will of that person to the will of the other.

It seems to me that it is of essential importance to keep quite distinct two things which in their nature seem to me to be different—the rights of the donor, and the duties of the donee and the obligations which are imposed upon the conscience of the donee by the principles of this Court. As to the rights of the donor in a case like the present I entertain no doubt. It seems to me that persons who are under the most complete influence of religious feeling are perfectly free to act upon it in the disposition of their property, and not the less free because they are enthusiasts. Persons of this kind are not dead in law. They are dead indeed to the world so far as their own wishes and feelings about the things of the world are concerned; but such indifference to things external does not prevent them in law from being free agents. In the present instance there was no duress, no incompetency, no want of mental power on the part of the donor. It seems to me that, so far as regards her rights, she had the absolute right to deal with her property as she chose. Passing next to the duties of the donee, it seems to me that, although this power of perfect disposition remains in the donor under circumstances like the present, it is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shewn that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside—the means of considering his or her worldly position and exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play. If this had been the gift of a chattel, therefore, the property then would have passed in law, and the gift of this stock may be treated upon a similar method of reasoning. Now, that being the rule, in the first place, was the Plaintiff entitled to the benefit of it? She had vowed in the most sacred and solemn way absolute and implicit obedience to the will of the Defendant, her superior, and she was bound altogether to neglect the advice of externs—not to consult those outside the convent. Now I offer no sort of criticism on institutions of this sort; no kind of criticism upon the action of those who enter them, or of those who administer them. In the abstract I respect their motives, but it is obvious that it is exactly to this class of case that the rule of equity which I have mentioned ought to be applied if it exists. It seems to me that the Plaintiff, so long as she was fettered by this vow—so long as she was under the dominant influence of this religious feeling—was a person entitled to the protection of the rule. Now, was the Defendant bound by this rule? I acquit her most entirely of all selfish feeling in the matter. I can see no sort of wrongful desire to appropriate to herself any worldly benefit from the gift; but, nevertheless, she was a person who benefited by it so far as the disposition of the property was concerned, although, no doubt, she meant to use it in conformity with the rules of the institution, and did so use it. I pause for one moment to say a word as to Mr. Justice *Kekewich's* view, which is not altogether consistent with the above. He seems to have thought that the question turned on the original intention of the donor at the time she entered the convent, and that what passed subsequently could be treated as if it were a mere mechanical performance of a complete mental intention originally formed. I entirely agree with the view presented to us by the Appellant as to that part of Mr. Justice *Kekewich's* judgment. It seems to me that the case does not turn upon the fact that the standard of duty was originally created by the Plaintiff herself, although her original intention is one of the circumstances, no doubt, which bear upon the case, and is not to be neglected. But it is not the crucial fact. We ought to look, it seems to me, at the time at which the gift was made, and to examine what was then the condition of the donor who made it. For these reasons I think that without any interference with the freedom of persons to deal with their property as they please, we can hold but one opinion, that in 1879 the Plaintiff could have set this gift aside.

Then comes the question of the time which has elapsed since. What effect has time upon a right to the protection of this rule? The rule is an equity arising out of public policy. I do not think that the delay in itself is an absolute bar, though it is a fact to be considered in determining the inference of fact which appears to me to be the one that we must draw on one side or the other. I have described, to the best of my power, what to my mind the principle of the rule is. It is a principle arising out of public policy, and one which imposes a fetter upon the conscience of the recipient of the gift. When is that barrier removed from the conscience of the recipient of the gift. It seems to me that the common-sense answer ought to be—and I think the right answer is—as soon as the donor escapes from the religious influence which hampered her at the time, as soon as she becomes free, and has determined to leave the gift where it is.

Now, if she has so acted, if her delay has been so long as reasonably to induce the recipient to think, and to act upon the belief that the gift is to lie where it has been laid, then, by estoppel, it appears to me that the donor of the gift would be prevented from revoking it. But I do not base my decision here upon the ground of estoppel. Yet a long time has elapsed. Five years is a long time in the life of anybody, and is a long time in the life of a person who has passed her life in seclusion like the Plaintiff. Every day and every hour during those five years she has had the opportunity of reflecting upon her past life and upon what she has done. She has had that opportunity since she passed away from the influence of the Defendant, and that she did pass away from it most completely is proved to demonstration by the fact that she entered a different religious community. Having belonged to the Church of *England* she at once entered the Church of *Rome*. The influence, therefore, ceased completely. She was surrounded by persons perfectly competent to give her proper advice. She had her solicitor. She had her brother, a barrister himself, and she had the directors of the consciences of the community which she had entered. I draw unhesitatingly the inference, under the circumstances, that she did, in or shortly after 1879, consider this matter and determine not to interfere with her previous disposition. Was she aware of her rights at the time she formed this resolution? In my view I incline to think that she must have been, having regard to the character of the advisers who surrounded her; but I do not consider it to be essential to draw that inference. It is enough if she was aware that she might have rights and deliberately determined not to inquire what they were or to act upon them. There, again, I unhesitatingly draw the inference that she was aware that she had rights or might have them and that she deliberately made up her mind not to enforce them. In drawing this inference of fact I do no discredit to the character of the Plaintiff, which is above all reproach, but on carefully considering her evidence I do not feel that I can place reliance upon her memory; and, in my view, it would be wrong to draw the inference from her evidence that she did in her own mind never form any definite view about the property she left behind in the convent.

I need hardly say that I feel great embarrassment in having to give the casting voice in a matter of such great importance, when two whose opinions and authority are far greater than my own differ in the matter. In my view, this appeal ought to be dismissed, and dismissed on the ground that the time which has elapsed, though not a bar in itself, though not accurately to be described as mere laches which disentitles the Plaintiff to relief, is nevertheless, coupled with the other facts of the case, a matter from which but one reasonable inference ought to be drawn by men of the world—namely, that the lady considered her position at the time, and elected and chose not to disturb the gift which she then at that moment felt, if she had the will, she had the power to disturb.

The appeal is therefore dismissed with costs.

Solicitors for the Plaintiff: *Blount, Lynch & Petre.*

Solicitors for the Defendant Skinner: *Freeman & Son.*

Solicitors for the Railway Companies: *Paterson, Snow & Co.*; *Beale & Co.*

M. W.

KAY, J.
1887
June 8.

In re CASTLE.

[1886 C. 4962.]

Practice—Costs—Taxation—Objections to Taxing Master's Finding—Certificate—Summons to review—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-rr.* 39, 41.

To enable the Court to entertain a summons to review a Taxing Master's certificate, where the ground of objection is to the whole of the finding generally, it is not necessary that the objections raised by the summons to his finding should have been carried in before the signing of the certificate; Order LXV., rule 27, sub-rules 39 and 41 being applicable only where particular items are objected to.

Sparrow v. *Hill* (1) followed.

Where, under an order for taxation of a solicitor's bill of costs and cash account, the Taxing Master found that, in consequence of all accounts between the parties having been settled, there was nothing to tax, and certified accordingly, but no objections to the finding were carried in before the certificate was signed:—

Held, that the Court had jurisdiction to entertain a summons to review the certificate.

ADJOURNED SUMMONS.

On the 23rd of February, 1887, an order was made by the Chief Clerk directing a solicitor to deliver bills of costs and a cash account, the order also containing a direction to "tax and settle the said bills and cash account; any settlement made between the parties of any bill of costs already delivered not to be disturbed."

The solicitor made out and delivered to the client a bill of costs and cash account, which were then carried in for taxation; but the Taxing Master, being of opinion that there had been a complete settlement of all accounts between the parties up to July, 1881, and that the costs incurred since had been recovered in an action and paid, held that there was nothing to tax, and, on the 22nd of April, 1887, made his certificate to that effect.

The solicitor, being dissatisfied with this finding, then took out this summons, asking that the certificate might be discharged or varied so far as it certified a settlement of account between the parties, and that the Taxing Master might be ordered to proceed with the taxation.

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(1) 7 Q. B. D. 362; 8 Q. B. D. 479.

No objection to the Taxing Master's finding had been delivered or carried in by the solicitor before the certificate was signed.

Upon the summons being opened a preliminary point was raised, on behalf of the client, whether the Court could now review the certificate, having regard to the fact that no objection to the Taxing Master's finding had been carried in under Order LXV., rule 27, sub-rules 39, 41.

E. Beaumont, for the client:—

Sub-rule 39 is precise, that any objection to taxation must be carried in before the Taxing Master signs his certificate; and sub-rule 41 makes the certificate "final and conclusive as to all matters which shall not have been objected to in manner aforesaid." Accordingly, I submit that the Court has now no jurisdiction to order a review of the taxation.

Marten, Q.C., and *W. D. Rawlins*, for the solicitor:—

The sub-rules referred to are substantially identical with rules 30 and 32 of Order VI. of Rules of Supreme Court (Costs), 1875, which rules were held to apply only where particular items were objected to, and not where the general principle of taxation was challenged: *Sparrow* v. *Hill* (1). Sub-rule 37 of the present Order LXV., rule 27, continues the former practice as to costs so far as it is not inconsistent with the new practice.

KAY, J.:—

Sparrow v. *Hill* is a distinct authority for the proposition that to enable the Court to order a review of taxation it is not necessary that objections to the Taxing Master's finding should have been carried in before certificate, when the ground of objection is to the whole of his finding. Here there has been no taxation at all. In my opinion, therefore, the Court has jurisdiction to entertain this summons to discharge or vary the certificate.

Solicitors: *G. Castle; Saxelby & Faulkner.*

G. I. F. C.

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(1) 7 Q. B. D. 362; 8 Q. B. D. 479.

KAY, J.
1887
May 21; June 11.

In re ROBERTS.
EVANS *v.* ROBERTS.

[1884 R. 1633.]

Bill of Sale—Registration—Sale of Goods—Entry in Auctioneer's Book—"Assurance of Personal Chattels"—Bills of Sale Act, 1878 (41 *& 42 Vict. c.* 31), *ss.* 4, 8 [*Revised Ed. Statutes, vol. xviii., pp.* 652, 654]—*Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17 [*Revised Ed. Statutes, vol. i., p.* 777.]

Where a contract for sale of goods within sect. 17 of the *Statute of Frauds* is valid solely by virtue of a memorandum in writing, such memorandum is an assurance of personal chattels within the *Bills of Sale Act*, 1878.

At a sale of farm produce by auction, *W.* bought a stack of hay for £40 5*s*. The auctioneer's clerk signed the name of *W.* as purchaser in the auctioneer's book, which was also signed by the auctioneer, and contained a copy of the conditions of sale, and specified the lot and the price. No part of the purchase-money was paid, one of the conditions being that the purchaser was to have six months' credit, and the whole of the hay remained on the premises of the vendor and in his apparent possession. The entry in the auctioneer's book was not registered as a bill of sale under the *Bills of Sale Act*, 1878. The hay was seized in execution under a judgment obtained by creditors of the vendor:—

Held, that as the sale would have been void under sect. 17 of the *Statute of Frauds* but for the memorandum of the contract contained in the auctioneer's book, such memorandum was an assurance and a bill of sale within the *Bills of Sale Act*, 1878, and therefore void as against the execution creditors for want of registration.

ON the 23rd of October, 1886, certain farm produce was put up for sale by public auction.

The conditions of sale were to the following effect:—

1. The highest bidder shall be the purchaser, and if any dispute shall arise the lot in dispute shall be put up again at the last undisputed bidding.

2. Every lot after being knocked down to be at the purchaser's risk, with all its blemishes and defects.

3. Credit for £2 and upwards will be given until the 21st of May, 1887, provided satisfactory sureties be furnished if required by the auctioneer, or 6*d.* in the pound discount will be allowed for ready cash.

At the sale *Robert Williams* bought a stack of hay for £40 5*s*. When it was knocked down to him the auctioneer's clerk, in his presence and with his assent, signed his name as the purchaser in the auctioneer's book, which contained a copy of the conditions of sale, and specified the lot and the price.

The auctioneer also signed the book.

No money was paid, and no sureties were required to be furnished in pursuance of the third condition of sale.

None of the hay was removed, and it remained on the premises of the vendor, *R. Thomas*.

In this action, which was for the administration of the estate of *Jane Roberts*, an order was made that the vendor, who was a Defendant, should pay certain costs to the Plaintiffs. The costs were taxed at £131 11*s*. 1*d*., and a writ of *fi. fa.* issued for that amount. The sheriff of *Carnarvon* seized the haystack in execution of the writ. *R. Williams* claimed the hay, and an interpleader summons was taken out by the sheriff on the 20th of January, 1887.

The hay was subsequently sold by arrangement and the purchase-money paid into Court.

The summons was adjourned into Court for argument as between the claimant, *R. Williams*, and the execution creditors.

It was stated that the vendor had become bankrupt, and that the official receiver claimed to be entitled to the hay as against the execution creditors, but made no claim as against the claimant.

There was evidence that it was customary in the district in which the sale took place for credit to be given in the manner provided in the conditions of sale, and for goods, such as hay, to remain on the premises of the vendor until the time of year when it was convenient to remove them.

H. Terrell, for the sheriff.

F. Marshall, for the claimant:—

The property in the hay passed to *Williams* as purchaser by the contract of sale, and the entry in the auctioneer's book was not an assurance of personal chattels, but merely a document

KAY, J.
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evidencing a contract previously entered into. It was therefore not a bill of sale within the meaning of sect. 4 of the *Bills of Sale Act*, 1878, and did not require registration: *Marsden* v. *Meadows* (1). The title of the claimant must, therefore, prevail over that of the execution creditors.

H. Tindal Atkinson, for the execution creditors:—

The entry in the auctioneer's book was an assurance of personal chattels and a bill of sale within the meaning of the *Bills of Sale Act*, 1878, and therefore void against the execution creditors for want of registration.

As no part of the purchase-money was paid, and there was no acceptance and actual receipt of any part of the goods by the purchaser, the contract of sale would have been void under sect. 17 of the *Statute of Frauds* but for the entry in the auctioneer's book, which, it must be admitted, was a sufficient memorandum within the section. Where there is a parol contract for sale which is void for non-compliance with the section, and subsequently a memorandum in writing is given, it may be that the title of the purchaser relates back to the sale, but nevertheless there is no title in him until the memorandum comes into existence. In the present case the memorandum is the document from which the title of the purchaser flows, and it is therefore an assurance of personal chattels and a bill of sale requiring registration: *Ex parte Baum* (2). In *Leroux* v. *Brown* (3) the difference is pointed out between sect. 17 of the *Statute of Frauds*, which avoids the contract, and sect. 4, which relates only to procedure and not to the validity of the contract. It may be conceded, as was said in *Alderson* v. *Maddison* (4) and *Britain* v. *Rossiter* (5)—which, however, were decided under sect. 4—that under sect. 17, as under sect. 4, the memorandum is merely evidence which is indispensable when it is sought to enforce the contract, but if the memorandum is, as it is here, a document without which the purchaser can have no title to the goods, it must be also an assurance of personal chattels. An assurance

(1) 7 Q. B. D. 80.
(2) 10 Ch. D. 313, 321.
(3) 12 C. B. 801, 825.
(4) 7 Q. B. D. 174.
(5) 11 Q. B. D. 123.

within sect. 4 of the *Bills of Sale Act*, 1878, need not necessarily be a conveyance. Inventories and receipts, which the Act describes as assurances, are not conveyances, but if they become the only records of the transaction and the only modes by which title is conferred, they may be assurances within the *Bills of Sale Act*, 1878. In *Marsden* v. *Meadows* (1) a deposit was paid at the time of sale, and therefore the requirements of sect. 17 of the *Statute of Frauds* were satisfied, so that the property sufficiently passed by the contract without any memorandum in writing. But Lord Justice *Bramwell* (2) said that where a receipt was intended to be a record of the transaction it must be registered. *Marsden* v. *Meadows* was approved and explained in *North Central Wagon Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (3).

[KAY, J., referred to *Woodgate* v. *Godfrey* (4).]

It is clear that the goods remained in the apparent possession of the vendor according to the definition contained in sect. 4 of the *Bills of Sale Act*, 1878, and therefore this unregistered bill of sale is rendered void as against the execution creditors by sect. 8 of that Act.

Marshall, in reply:—

The entry in the auctioneer's book was "a document used in the ordinary course of business as proof of the possession or control of goods," within the exception contained in sect. 4 of the *Bills of Sale Act*, 1878. If not, it was "a transfer of goods in the ordinary course of business of any trade or calling" within the same exception.

[KAY, J.:—Of the business of the auctioneer, but not of the vendor: the statute must mean in the ordinary course of the vendor's business, not of that of an agent appointed to sell for him.]

There was a constructive delivery of goods to the purchaser constituting acceptance and receipt within the 17th section of the *Statute of Frauds*. The property remained in the possession

(1) 7 Q. B. D. 80.

(2) Ibid. 86.

(3) 32 Ch. D. 477; on appeal, 35 Ch. D. 191.

(4) 5 Ex. D. 24.

of the vendor by the agreement of the parties and the custom of the country. It was standing there at the purchaser's risk, and the vendor had lost his lien and was a mere bailee for the purchaser, under whose control the goods were, and who might have removed them at any time: *Salter* v. *Woollams* (1); *Cusack* v. *Robinson* (2); *Castle* v. *Sworder* (3); *Spartali* v. *Benecke* (4).

Marsden v. *Meadows* (5) is directly in point, and shews that the memorandum in the auctioneer's book, being only evidence of an antecedent contract, was not a bill of sale, and did not require registration. The property in goods sold does not pass by the giving of a memorandum under sect. 17. If there were a sale by weight the property in the unweighed part would not pass though a memorandum were given: *Simmons* v. *Swift* (6). The memorandum is not the document on which the title of the purchaser depends.

The *Bills of Sale Act*, 1878, does not apply to the case of goods sold at public auction.

It may be questioned whether this haystack was a "personal chattel" within the meaning of sect. 4 of the Act of 1878. It appears to come within the exception contained in the definition of personal chattels, viz. "stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale."

1887. June 11. KAY, J. (after stating the facts as to the sale of the hay, continued as follows:—)

It is suggested that though the hay remained on the land of the vendor his possession of it was changed, so that he became bailee for the purchaser and thus lost his vendor's lien, and that the hay was constructively delivered to the purchaser as in *Cusack* v. *Robinson*, *Castle* v. *Sworder*, and other cases which are collected in the late Mr. *Benjamin's* book on Sales (7). I

(1) 2 Man. & G. 650.
(2) 1 B. & S. 299.
(3) 6 H. & N. 828.
(4) 10 C. B. 212.
(5) 7 Q. B. D. 80.
(6) 5 B. & C. 857.
(7) 2nd Ed. p. 136; 3rd Ed. p. 143.

do not think that this is proved. In all those cases the goods had been delivered to the purchaser, and there had been a clear agreement with the vendor to keep them as bailee; as, for example, where a horse after the purchase is put at livery with the vendor, the purchaser paying for his keep.

In my opinion there was no receipt of this hay or of any part of it by the purchaser. Consequently the 17th section of the *Statute of Frauds* avoids the sale unless it is saved by the signature by the auctioneer and his clerk of the book of the auctioneer. It is not denied that this does prevent the operation of sect. 17. That is decided in *Bird* v. *Boulter* (1) and other cases. The consequence is, that but for that signature the transaction would be wholly void, the difference between sect. 17 and sect. 4 of the *Statute of Frauds* being that sect. 17 avoids the transaction, sect. 4 only prevents any action being brought if the memorandum be wanting.

Judgment creditors of the vendor having, under a *fi. fa.*, effected a seizure of the hay, this interpleader summons was taken out on the 20th of January last. The hay has since been sold by arrangement, and the money is in Court. The execution creditors and the previous purchaser now interplead. The question raised is whether the memorandum in the auctioneer's book is not a bill of sale, and therefore void against the execution creditors for want of registration under the *Bills of Sale Act*, 1878.

It was suggested in argument that the *Bills of Sale Act*, 1878, does not apply to a sale by auction on account of the publicity of the transaction. No authority was cited for this. I am not aware of any. The Act does not except sales by auction. Even the Act of 1854 (which the Act of 1878 repeals), although the preamble states that it is for remedy of the frauds frequently committed upon creditors by secret bills of sale, was not confined to secret bills of sale; or rather, it treated all bills of sale as secret which were not registered under its provisions. If a sale must be excepted because of its publicity, it follows that no unregistered bill of sale would be void against an execution creditor who was aware of the sale at the time. That is not the law. The point was decided in *Edwards* v. *Edwards* (1). The case is clearly within the mischief intended to be prevented by the Act. The hay remained in the apparent possession of the vendor within the very words of sect. 4. It was upon the land occupied by him. The statute was passed to relieve an execution creditor in such a case of apparent possession from the danger of being defeated by an unregistered assurance. Even if in law the possession might for some purposes be taken to be that of the grantee, the statute of 1878 avoids the bill of sale if the goods are in "the possession or apparent possession" of the grantor. "Apparent possession," contradistinguished from "possession," must mean "if apparently though not actually in his possession;" and this is said in terms in sect. 4, which provides that goods shall be deemed to be in the apparent possession of the grantor when upon land in his occupation, "notwithstanding that formal possession thereof may have been taken by or given to any other person." It is argued that it would seriously interfere with auction sales to hold that the *Bills of Sale Act*, 1878, applied to them. That is a consideration for the Legislature rather than the Court. But the fact is not so. Rarely it happens that these circumstances concur—a sale by auction without payment of deposit or actual acceptance and receipt of the goods, leaving them in the apparent possession of the vendor, and an execution levied before anything has been done to bind the vendor except the giving of a memorandum under sect. 17 of the *Statute of Frauds*.

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(1) 4 B. & Ad. 443.

Then it is argued that the auctioneer's book is not an assurance within sect. 4 of the *Bills of Sale Act*, 1878. It contains the conditions of sale, the number of the lot, and the name of the purchaser, and is signed by the vendor's agent. Whatever other dispute may arise upon the meaning of the word "assurance" in sect. 4, placed as it is in immediate connection with the words "assignments," "transfers," "declarations of trust," "inventories of goods with receipt thereto attached," and "receipts for purchase-moneys of goods," there can be no doubt that a written memorandum, which is not merely evidence of the transaction but without which the transaction of sale and purchase is void, must

(1) 2 Ch. D. 291.

be a document of title which can properly be called an assurance. Suppose in this case a receipt had been given for the purchase-money shewing the terms of sale, no purchase-money having been paid, that would have come within the very words of sect. 4. The companion words, "other assurances," may reasonably, if not necessarily, be read to include such a document of title as this. In truth, the auctioneer's book is equivalent to a memorandum:—"I, *A. B.*, have sold to *C. D.* the stack of hay on my land for £40 5*s.* this 23rd day of October, 1886. Signed *A. B.*" If thus written large, and there was no payment or delivery, would any one doubt this was a bill of sale? It seems to me indisputable; and as the auctioneer's book was the exact equivalent for this purpose of such a memorandum, I must hold that it was, in this case, a bill of sale also. I distinguish this from a case in which the sale would be valid and complete without the memorandum. For instance, if there had been part payment, or acceptance and receipt of part of the goods, so that no memorandum was necessary, the sale might not be affected by a superfluous memorandum which was not registered.

There is no authority precisely in point. *Marsden* v. *Meadows* (1) is perhaps the nearest. In that case the purchaser bought goods from the sheriff, who sold under an execution. The purchaser paid all the purchase-money, part as a deposit, the remainder next day. He took possession, but allowed the judgment debtor to remain in apparent possession of the goods, and they were subsequently seized by another execution creditor of the same debtor. In the meantime, after completion of the purchase, the sheriff had sent to the purchaser an inventory of the goods with a receipt for the purchase-money attached. The Court of Appeal held that this was not a document which required registration under the Act of 1878, Lord Justice *Cotton* (2) saying that the "document to be a bill of sale to which the Act applies, must be one on which the title of the transferee of the goods depends, either as the actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken, to use an expression found in some of the cases, at the time as a record of the transaction." Lord Justice *Bramwell* said that the

(1) 7 Q. B. D. 80.

(2) 7 Q. B. D. 84.

KAY, J.
1887
In re ROBERTS.
EVANS *v.* ROBERTS.

receipt, which under the terms of the Act requires registration, must be one "intended to be the instrument of transfer or a record of the transaction." Lord *Esher* (then Lord Justice *Brett*), pointed out that attempts had been made to evade the *Bills of Sale Act*, 1854, by a grantor remaining in possession, giving a receipt and inventory upon a verbal agreement to pass the property, and that the Act of 1878 was passed to meet such cases; but he says if a bill of sale had been given by the sheriff it would have been necessary to register it.

The Act of 1878 only avoids the bill of sale; it does not avoid any transaction of sale which is complete without it. It was not necessary to the decision in *Marsden* v. *Meadows* (1) to say that the instrument there in question was not a bill of sale within the Act. The same result would have been arrived at if the Court had held that it was a bill of sale and void because unregistered, but that the sale was good, nevertheless, because complete before it was given.

The claimant must be barred, and he must pay the costs of this interpleader summons.

Solicitors: *Rooke & Sons,* agents for *C. A. Jones, Carnarvon; Rushton,* agent for *D. L. George, Criccieth; Bolton, Robbins, Busk & Co.,* agents for *Owen Owen, Pwllheli.*

C. C. M. D.

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(1) 7 Q. B. D. 80.

In re GRAY.
DRESSER *v.* GRAY.

KAY, J.

1887

May 23; *June* 24.

[1887 G. 456.]

Will—Legacy—General or Specific—Uncertainty—Gift of Shares in Unlimited Company subsequently converted into Limited Company—Change in Value of Shares.

A testator bequeathed "fifty shares in the *York Union Banking Company*," to be held upon certain trusts. At the date of the will the company was registered and incorporated as an unlimited company under the *Companies Acts*, and the testator held seventy shares therein of the nominal value of £100 each. Between the dates of his will and his death the company was registered as a limited company under the same style, except that the word *Limited* was added, and each £100 share was converted into two shares of the nominal value of £60, and 140 of these new shares were allotted to the testator in substitution for his seventy shares of £100 each:—

Held, that the bequest was not specific but general, that it was in effect a gift of such a sum as at the death of the testator should be the value of fifty shares of £100 each in the unlimited company, and that as, by reason of events of which the testator was aware, it had become impossible to determine such value, the bequest failed.

ADJOURNED SUMMONS.

George Gray, who died on the 7th of February, 1887, by his will, dated the 19th of July, 1882, appointed the Plaintiffs, *T. Dresser* and *G. Garbutt*, trustees and executors thereof, and after making certain bequests in favour of his wife, the Defendant *Mary Gray*, devised a freehold messuage, bequeathed certain furniture and other household effects, and also bequeathed "fifty shares in the *York Union Banking Company* unto the said *T. Dresser* and *G. Garbutt* upon the trusts following, that is to say, upon trust to permit and suffer my said wife to have the use and enjoyment of the same messuage and furniture . . . . and to permit and empower her to receive the annual income of the said shares during her life, and after her death" upon trust to sell the messuage, furniture and shares, and divide the moneys to arise from such sale (after paying expenses) equally between his sisters, *E. Eeles* and the Defendants *Jane Gray* and *Sarah Gray*, but in case any of them should die in the lifetime of his wife then equally between the survivors or survivor, and if all of them should die in the lifetime of his wife, then equally between his nieces the Defendants, *Mary Jane McCardle* and *Sarah Ann H. Gray*, and after bequeathing certain legacies, the testator gave and devised all the residue of his real and personal estate to the Plaintiffs upon trust to sell and convert and out of the proceeds pay his debts and funeral and testamentary expenses and legacies, and divide the residue equally between his said three sisters, but if any of them should die in his lifetime then equally between the survivors or survivor.

The Plaintiffs proved the will.

The testator's sister, *E. Eeles*, died in his lifetime.

Upon the hearing of the summons the evidence as to the constitution of the *York Union Banking Company* and the nature of the testator's holding in it was contained in an affidavit by *T. Dresser*, one of the trustees, and was to the following effect:

At the date of the will the *York Union Banking Company* was an unlimited company formed under the statute 7 Geo. 4, c. 46, and unincorporated, and the testator was the holder of 70 shares in the company which were of the nominal value of £100 per share, and on which £25 per share had been paid up. Their market value was £67 per share.

In the month of May, 1883, the banking company was converted into a limited company, under the provisions of the *Companies Acts*, 1862 to 1879, and the nominal value of the shares was reduced to £60 per share, of which £12 10*s.* was considered to be fully paid up, the then shareholders being entitled to have an increased number of shares allotted to them to make the amount equivalent in value to their old shares, and under this arrangement the limited company, at the request of the testator, allotted to him 140 of the new shares of the nominal value of £60 each.

The testator, at the date of his death, held 171 shares in the limited company of the nominal value of £60 each, and upon which the sum of £12 10*s.* was paid up; the 171 shares included the 140 shares allotted as last mentioned.

This was an originating summons taken out under the Rules of the Supreme Court, 1883, Order LV., rules 3 and 4, asking that it might be determined whether the bequest of fifty shares in the *York Union Banking Company*, in the said will contained, applied only to fifty of the shares in the said banking company, held by the testator at the time of his death, or how and in respect of what number of such shares the said bequest operated.

The summons was adjourned into Court, and now came on for hearing.

Byrne, for the Plaintiffs, the trustees.

Statham, for the Defendants, the widow and nieces:—

Under the bequest of fifty shares in the *York Union Banking Company* the legatees are entitled not merely to fifty shares in the limited company, but to such a number thereof as is the equivalent of fifty shares of £100 each in the former company.

It is clear that there was no ademption of this gift by the conversion of the company into a limited company. In *Bronsdon* v. *Winter* (1) a testator gave £2000 *South Sea* stock; at the time of making his will he had just £2000 of the stock: he afterwards sold £1500 of it, and three-fourths of the residue was turned into annuities by Act of Parliament, and it was held that there was no ademption, and that the £2000 stock must be made good out of the testator's personal estate. So in *Partridge* v. *Partridge* (2) the testator, who had £1800 *South Sea* stock, gave £1000 of it; he afterwards sold £1600 and then bought £1400; between the making of the will and the testator's death the stock was changed into annuities, and it was held that these circumstances made no alteration in the legacy. The conversion of stock into annuities is a much greater change of the nature of property than that which took place in the present case.

[KAY, J.:—But there the change was by the act of the Legislature, not by the volition of the testator.]

The gift, not being specific, is governed by sect. 24 of the *Wills Act* (1 Vict. c. 26) and must take effect as if the will had been executed immediately before the death of the testator.

[KAY, J.:—A contrary intention within the meaning of that section appears here, because it is plain that the testator referred to the *York Union Banking Company* which existed at the time when he made his will. How can a gift of shares in a partnership operate to pass shares in an incorporated company?]

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(1) Amb. 57.

(2) 9 Mod. 269; Cas. t. Tal. 226.

The gift is equivalent to a direction to the executors to purchase shares in a company which exists, and such a direction is perfectly capable of being carried out. The amount of the shares has been changed, but at the time when the testator used the word "shares" there were only £100 shares, and the gift therefore operates as a direction to the executors to purchase an equivalent number of shares in the limited company.

Scott Fox, for the other Defendants, the residuary legatees:—

This gift fails. If it is a specific bequest, it was manifestly adeemed when the unlimited and unincorporated banking company was changed into a limited and incorporated company, the shares in which were a wholly different thing from the old shares: *Millard* v. *Bailey* (1); *In re Gibson* (2).

[KAY, J., referred to *In re Lane* (3) and *Morrice* v. *Aylmer* (4).]

But treating the gift as general (which it appears to be: see *Macdonald* v. *Irvine* (5)), it equally fails, on the ground of uncertainty, because it operated as a direction to the executors to purchase shares in an unlimited and unincorporated company which has ceased to exist, and it is therefore impossible to ascertain what amount of money the legatees are entitled to.

In any view the legatees cannot be entitled to more than fifty shares in the limited company, as they existed at the time of the testator's death: *Millard* v. *Bailey*.

Statham, in reply.

KAY, J.:—

In this case the testator by his will devised a freehold messuage and bequeathed furniture and also fifty shares in the *York Union Banking Company* to the Plaintiffs, in trust for his wife for her life, and after her death upon certain other trusts. I must

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(1) Law Rep. 1 Eq. 378.

(2) Ibid. 2 Eq. 669.

(3) 14 Ch. D. 856.

(4) Law Rep. 10 Ch. 148; 7 H. L. 717.

(5) 8 Ch. D. 101.

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put myself in the chair of the testator in order to appreciate the question which has been raised. At the time when he made his will there was a *York Union Banking Company.* It was formed under 7 Geo. 4, c. 46, and was one of a class of companies which are thus described in the work of Lord Justice *Lindley* on Partnership (1): "Partnerships privileged by the Crown or the Legislature to sue and be sued by a public officer. These companies are sometimes said to be *quasi* incorporated." That is to say, it was not a corporation. The testator had shares of his own in this company, more than fifty in number. After the date of his will the company, like most other banking companies in this country, determined to change its constitution, and it did so by taking proceedings to be registered as a limited company, shares in which would of course be entirely different, and it thereby became a corporation, so that the shares became different for two reasons, viz., first, that they were shares in a corporation, and secondly, that they were limited shares, whereas in the old company there was no limit of liability on the shares. Moreover the shares in the limited company were of different amount from those in the old company, and an option was given to the testator, if he chose, of exchanging his shares in the old company for shares in the new corporation. He exercised this option, and thereupon became possessed of a much larger number of shares in the new corporation than the number which he had previously held. He never altered his will.

In the first place, the question arises is this or is it not a specific bequest? The testator does not refer to his shares, there is nothing at all to make it apparent on the face of the will that he intended to dispose of shares which he then held, and the number of shares of which he does dispose is not identical with the number which he then held. I cannot say, looking at the terms of the will, that there is anything to make this a specific bequest. If he had had no shares at his death, I apprehend the case would have come distinctly within *Macdonald* v. *Irvine* (2), where a testator who had Egyptian 9 per cent. bonds, which he afterwards sold, made a bequest to his nephew of "500 Egyptian 9 per cent. bonds," and it was held not to be a specific bequest

(1) 4th Ed. p. 12.

(2) 8 Ch. D. 101.

but a general legacy. Therefore I think this is not a specific bequest but a general legacy.

But supposing I am wrong about that, and that this is a specific bequest, is it possible to say that a specific bequest of this kind would pass shares in a corporation formed after the date of the will, part of the name of which happened to be the same, and which was formed no doubt by the constituents of the unincorporated company which existed at the date of the will? No authority for that proposition was cited, and it seems to me that it would be impossible that a gift of fifty shares in the *York Union Banking Company*, an unincorporated company, the shares in which were unlimited, and which had entirely ceased to exist at the death of the testator, should pass shares in the *York Union Banking Company, Limited*, an incorporated company, formed by such of the shareholders in the former company who chose to become members, formed after the date of the will and by registration under the *Companies Act*, 1862. The two things are as different as possible. The shares which the testator described in his will were shares in the unincorporated company which was a wholly different thing from the incorporated company. It is idle to say that the will must be read as speaking from the death of the testator so as to pass shares in this incorporated company formed after the date of the will. In reference to that there is as distinct authority as there can be in the case, amongst others, of *In re Lane* (1), where the testator having certain debentures at the date of his will thereby gave "all my debentures" upon certain trusts. After the date of the will he exercised an option given to him by the company who had issued the debentures, and converted them into debenture stock, and it was held that the debenture stock did not pass. Therefore if this were a specific gift it seems to me clear that the testator having accepted, as he was not in the least bound to do, shares in the incorporated company after the date of his will instead of the shares which he then held in the unincorporated company, those shares in the incorporated company were so entirely a different thing from the shares in the unincorporated company that the legacy would be adeemed and that they would not pass.

But then let me try it on the assumption that this is, as I think it is, a general legacy. Then there arises this great difficulty: a general legacy of this kind amounts in effect to a direction to the testator's executors to buy the shares or other property designated, that is, in the present case, fifty shares in the unincorporated company. Of course the Court will do its utmost to maintain the legacy, and if for any reason the shares could not be bought, or if the legatee had a choice in the matter and said that he would rather not have shares, he would then take the amount of money which would have had to be expended in buying them. But when this testator died, suppose the legatees had come to the executors and said "now hand over to us the legacy." The difficulty would have arisen at once, and the answer would have been "it is impossible to buy shares in the company to which the testator referred. That company has been extinct for a long time. How is it possible to tell what amount you are entitled to?" If this be a general legacy it is impossible to take as a criterion the value of the shares at the date of the will, still less can you take as a criterion their value when the unincorporated company ceased to exist. It seems to me that the legacy fails, not because of any ademption, but because it has become, by circumstances of which the testator was aware, utterly impossible to determine what amount of money should be set apart for the persons entitled under the gift. I am very sorry to arrive at such a conclusion, but it seems to me on either view of the case, whether this be treated as a specific bequest or as a general legacy, the gift from the circumstances which have happened, must necessarily fail.

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(1) 14 Ch. D. 856.

C. C. M. D.

June 24, 1887. After the case was disposed of by his Lordship, as above reported, an affidavit was filed by the general manager of the *York Union Banking Company, Limited*, stating to the following effect: that prior to 1874 the company was a joint stock company, carrying on business under the name of the "*York Union Banking Company*," formed under an Act of 7 Geo. 4, for the regulation of banking copartnerships, and governed by a deed of settlement: that in 1874 the company was registered and incorporated as an unlimited company under the *Companies Act*, 1862: that from 1874 to 1883 the nominal amount of each share was £100: that in 1883 steps were taken for registering the company as a limited company; that in that year the company was so registered, and each £100 share was thereupon converted into two shares of £50 each, and the nominal amount of each of such £50 shares increased to £60 under the provisions of the *Companies Acts*, 1862–1880: that the necessary resolutions were passed for those purposes under the provisions of the deed of settlement: that the company became and now was a banking company under the provisions of Part VII. of the *Companies Act*, 1862: that on the 19th of July, 1882, seventy shares of £100 each were standing in the testator's name, and so remained till the 17th of May, 1883, when each of those shares was divided into two shares of £50 each, making together 140 shares of £50 each, increased to £60 each, which remained in the testator's name down to the 7th of February, 1887, the day of his death, together with thirty-one further shares of £60 each which were transferred into his name between the two last-mentioned dates.

In consequence of this affidavit the summons was restored to the paper for re-hearing on the application of the trustees, at the suggestion, it was said, of the testator's widow.

Byrne, for the Plaintiffs.

Renshaw, Q.C., and *Statham*, for the widow:—

We admit that this is a general, and not a specific legacy, and therefore, with regard to it, the will speaks from the death: *Wills Act*, 1 Vict. c. 26, s. 24. The company, as it existed at the date of the testator's death, was the same company as was registered in 1874, and was governed by the same deed of settlement. The only change was the conversion of the shares from unlimited into limited shares. This being, as we contend, a general trust legacy, the bequest should be made good by giving us either fifty shares or their equivalent in value.

Ince, Q.C., and *Scott Fox*, for the residuary legatees, were not called upon.

KAY, J.:—

It seems to me that my judgment on the former occasion was entirely right. Having heard the language of that judgment read to me, I should say that I cannot conceive any words which could more plainly intimate the conclusion at which I arrived.

There were two possibilities argued on the former occasion: one was that this bequest of fifty shares in the *York Union Banking Company* was a specific legacy; and the other was the alternative —which the Court adopted—that it was not a specific legacy, but a general legacy. It is admitted now that it is not a specific legacy, but a general legacy; and that, as I have said, was the conclusion at which the Court arrived on the former occasion.

Now, what is a general legacy of this kind? It is only this: a gift to the legatee "of so much money as will buy fifty shares at my death in the *York Union Banking Company*, which is an unlimited company." I have expanded the words used by the testator. The words used by the testator are precisely as though he had said all that. The difficulty which I pointed out last time, which I am extremely sorry for, and which I would have got over if it had been possible, is this: how can anybody tell what was the value at the testator's death of fifty shares in an unlimited joint stock company, which, as an unlimited company, had then ceased to exist? Of course, the answer was that nobody could tell. It is impossible to tell. No known system of calculation could answer that question.

Now, is that difficulty removed on the present occasion? I was previously told that the *York Union Banking Company* was an unincorporated joint stock company, formed under the Act 7 Geo. 4, c. 46, which regulates banking partnerships; and that afterwards it was incorporated and made into a limited joint-stock banking company, and that the shares were altered—altered in nominal amount as well as altered by being shares in a corporation, and also altered to shares limited under the *Companies Act*, 1862. It is thought worth while now to re-open the case, because at the date of the will, as I am now informed, this banking company was incorporated, but was an unlimited company; and that in the year 1883, the next year after the date of the testator's will—which was dated in July, 1882—steps were taken to register the company, and the company was registered as a limited company, and the shares which, down to that time, had been £100 shares in an unlimited company were divided into

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two shares of £50 each in a limited company. Besides that, each of such shares was increased from £50 to £60. So that, instead of there being at the testator's death an unlimited joint-stock banking company, with £100 shares, there was a company in existence called the *York Union Banking Company, Limited*, in which the shares were not £100 shares, but £60 shares, and not unlimited shares, but limited shares. The testator did not say to his executors, "I give to this legatee the value of fifty shares in a limited joint stock banking company, which shares are of the nominal value of £60;" but what he said in effect was, "I give to my legatee what at the time of my death shall be the value of fifty £100 shares in the *York Union Banking Company*, which is an unlimited company." How the additional evidence which has been adduced enables the Court to say what that value was, I cannot conceive; and how any one who understood the judgment which the Court delivered on the previous occasion can think that this additional evidence removes the difficulty passes my comprehension. All I can say is that this new application is a mere attempt to have the former one reheard. It is a misapprehension entirely, and I refuse it, with costs to be paid by the testator's widow. I understand that the summons was restored to the paper on the application of the trustees, and not on the application of the testator's widow; but still, as she has chosen to have it argued, she must pay the costs. Therefore, except with regard to the costs, the order stands as it was originally.

Solicitors: *Ridsdale & Son*, for *George Crumbie, York.*

G. I. F. C.

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[1885 B. 5577.]

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June 15.

Debenture—Memorandum of Agreement—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 *&* 46 *Vict. c.* 43), *s.* 17.

A memorandum of agreement between a company of the one part and the several persons named in the schedule thereto, called the lenders, of the other part, whereby the company covenanted to pay, on a day named, to each of the lenders (nine in number) the sum advanced by him, with interest, and as security for the payment thereof charged therewith all its undertaking, property, estate and effects of every kind:—

Held, to be a debenture in the ordinary acceptation of the term, and within sect. 17 of the *Bills of Sale Act*, 1882.

A debenture may consist of one document. It is not necessary that there should be a serial issue of documents to constitute them debentures.

FURTHER CONSIDERATION.

These actions, which had been consolidated, now came on upon further consideration, and the only question to be determined, and which had been reserved by the Chief Clerk's certificate, was whether a certain agreement, dated the 26th of July, 1883, and made between the company of the one part and the several persons mentioned in the schedule thereto, and thereinafter called the lenders, of the other part, was to be considered a debenture, and so within the 17th section of the *Bills of Sale Act*, 1882.

By the memorandum of agreement above referred to, after reciting that by a memorandum of agreement dated the 9th of July, 1883, and made between the company, of the first part, *Edward Gotto* and *Frederick Beesley* of the second part, and certain debenture-holders of the company of the third part, the debenture-holders authorized the company to mortgage or pledge, as collateral security for the repayment of any loan or loans made to the company, amounting in all to the sum of £6000 and interest at 15 per cent., all or any of the debentures of the company belonging to the said debenture-holders, and after further

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reciting that the company had procured the lenders to make to the company loans of the amounts set against their respective names in the schedule, upon condition of having the same secured in manner thereinafter expressed, it was witnessed as follows:—

1. "In consideration of the said loans the company covenants with each of the lenders that it will, on the 30th of April, 1884, or such earlier day as payment shall be demanded, as provided in art. 2, pay to each of them the sum so advanced by him, with interest thereon at the rate of 15 per cent. per annum from this day until repayment. If any payment of less than the whole of the said loans and interest shall be made, they shall be made to all the lenders rateably as in proportion to the amounts owing to them respectively, and if any payments are made in other proportions the lenders agree with each other to contribute such payments so as to make them rateable in manner aforesaid.

2. "The demand for payment referred to in art. 1 must be in writing and signed by the majority of sixty per cent. in amount of the lenders, not less than two in number, and left at the registered office of the company for the time being.

3. "As security for the payment of the said principal moneys and interest to the lenders the company hereby charges therewith all its undertaking, property, estate and effects of every kind, but subject to prior charges, and with liberty to the company to sell or pledge, in the ordinary course of business, until default shall be made in payment of the principal and interest secured by these presents, any iron or other things manufactured by it.

4. "As further security for the payment of the said principal moneys and interest, the company, in exercise of the authority given to it by the hereinbefore recited agreement, hereby mortgages and pledges all the debentures deposited by the said debenture-holders as aforesaid."

The agreement contained other clauses which are not material to be set out, and the schedule contained the names of the lenders, who were nine in number, and the amounts subscribed by them respectively, making up the sum of £6000.

The 17th section of the *Bills of Sale Act*, 1882, is as follows: "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

Ingle Joyce, and *R. J. Parker*, for the Plaintiff in the first action, took no part in the argument.

Romer, Q.C., and *C. Ashworth James*, for the Plaintiff in the second action:—

There is no definition of the term "debenture" in the *Bills of Sale Act*, 1882, or in any other Act of Parliament.

In the ordinary acceptation of the term a debenture means any document binding on an incorporated company, by which it acknowledges a debt to be due and undertakes to pay it.

Strike out of this instrument all those parts that relate to the other debentures mentioned in it and we say it becomes a debenture pure and simple, and if that is so, then it is within the exception of the 17th section of the *Bills of Sale Act*, 1882, and does not require registration.

[They referred to the following authorities:—*British India Steam Navigation Company* v. *Commissioners of Inland Revenue* (1); *Ross* v. *Army and Navy Hotel Company* (2); *In re Colonial Trusts Corporation* (3); *In re Florence Land and Public Works Company* (4), and the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31), s. 4.]

R. Vernon Smith, for the company:—

This agreement is not within the saving of sect. 17 of the *Bills of Sale Act*, 1882, and as it was not registered under that Act it is void.

It is impossible to hold that this memorandum of agreement is a debenture in the popular acceptation of the term. If such a document is a debenture, then every form of mortgage given by an unincorporated company would be a debenture. No commercial man would consider such a document a debenture.

Unlike the ordinary form of debentures, it includes and deals

(1) 7 Q. B. D. 165.
(2) 34 Ch. D. 43.
(3) 15 Ch. D. 465.
(4) 10 Ch. D. 530.

with the property of third persons; the greater part of its provisions relates to such property.

What is popularly known as a debenture is one of a series.

[He referred to *Brocklehurst* v. *Railway Printing and Publishing Company* (1) and *Gardner* v. *London, Chatham and Dover Railway Company.* (2)]

CHITTY, J.:—

The instrument in question is avoided by the *Bills of Sale Act*, 1882, unless it is within the exception of the 17th section.

The point suggested during the argument turning on the 4th section of the Act of 1878 was very properly abandoned at the bar, after an observation or two had fallen from me, to the effect that the words excluding certain instruments in the 4th section did not relate to the property of an incorporated or joint stock company, but to shares or interests, capital, or property of any such company, that is to say to shares or interests of members of the company.

Now the language of the 17th section of the Act of 1882 is this:—"Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels and effects of such company."

The term "debenture" has not, so far as I am aware, ever received any precise legal definition. It is, comparatively speaking, a new term. I do not mean a new term in the English language, because there is a passage in *Swift* which has been mentioned to me where the term "debenture" is used. I have the quotation before me (3). But although it is not a term with any legal definition, it is a term which has been used by lawyers frequently with reference to instruments under Acts of Parliament, which when you turn to the Acts of Parliament themselves are not so described. The "debentures" of a railway company are frequently spoken of; but the *Companies Clauses Act* of 1845 speaks of "bonds and mortgages" and not "debentures"; in argument, however, they are frequently so called. In the same way the instruments of a company incorporated under the Act of 1862, of which a register must be kept, are commonly called debentures, but the term in the Act is "mortgages" and "charges." It is an expression used frequently in the Law Courts, both by counsel and Judges, and it is a very convenient term; but it has no legal definition. That is the opinion of Mr. Justice *Grove* and of Lord Justice *Lindley* as expressed in the case of *British India Steam Navigation Company* v. *Commissioners of Inland Revenue* (1). The term itself imports a debt—an acknowledgment of a debt—and speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security. So that there are debentures which are secured, and debentures which are not secured. This distinction is shewn on the face of the 17th section, which speaks of "debentures" issued by an incorporated company, and secured upon its capital stock and chattels.

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(1) W. N. 1884, p. 70.

(2) Law Rep. 2 Ch. 201.

(3) "Your modern wits, should each man bring his claim,
Have desperate *debentures* on your fame,
And little would be left you, I'm afraid,
If all your debts to Greece and Rome were paid."

Now, ought I to put any narrow restricted interpretation upon the term "debenture" in this section? I see no reason why I should. I see one reason, though it may not cover all the ground, why I should not, and it is this: the two great classes of existing companies, viz., those established by Act of Parliament, incorporating the *Companies Clauses Act* of 1845, and those incorporated under the *Companies Act*, 1862, are bound by statutory provisions to keep a register of their debentures, using that term in the sense already explained.

The Legislature finding these existing provisions for registration may have considered that it was not necessary to require the registration under the *Bills of Sale Acts* of the secured debentures of an incorporated company. The Legislature may have acted on this ground, or may have taken the broader view that the secured debentures of incorporated companies were not

(1) 7 Q. B. D. 165.

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within the mischief intended to be remedied by the *Bills of Sale Act*.

In determining what is or is not a debenture within the section I am not bound to hold that an instrument is a debenture because it is called a debenture by the company issuing it, nor to hold it is not a debenture because it is not so called by the company. I must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, form the best opinion I can whether the instrument does or does not fall within the exemption of the section.

The argument of Mr. *Ashworth James* with regard to the document in question suggested an excellent test. If you strike out from it those parts which relate to the bringing of first and second debentures into the security, the document is almost verbatim in the same form as the debentures which have been issued by the company, and which unquestionably ought to be considered as debentures within the meaning of the section. The document does this: it contains a recital to shew that the company procured certain debenture-holders to assist the company in getting this loan. The first article witnesses that in consideration of the loan, the company covenants with each of the lenders that it will pay upon a particular day the sums advanced, with interest, and if any payments less than the whole of the loan shall be made, they shall be made to all the lenders ratably. Then, after some other clauses of the kind usually found in instruments which would at once be admitted to be debentures, there comes a charge in this form, "as security for the payment of the said principal moneys and interest to the lenders the company hereby charges therewith all its undertaking, property, estate and effects of every kind, but subject to prior charges, with liberty to the company to sell or pledge in the ordinary course of business, until default shall be made in payment of the principal and interest secured by these presents, any iron or other things manufactured by it." Without reading the rest of the instrument the effect is exactly as has been stated: it is an acknowledgment of a debt, the company is to pay the debt to each of the lenders separately. It gives a security to them and to all the lenders *pari passu* upon not any particular part of the property of the company, but all its undertaking, property, estate and effects of every kind, subject to prior charges. Then there is a schedule in which the names of the lenders are set forth. It appears to me that the instrument is within the exemption of the 17th section and not the less so because some of the first and second debenture-holders have thrown their debentures into the security.

I have seen debentures of various kinds and classes, and it is a mistake to say that to be debentures the instruments must be issued and numbered *seriatim*. I have even seen a single debenture issued to one man. There is nothing in the section requiring that more than one instrument should be issued. In this case the security is given to each one so that each shares *pari passu* with the other. No doubt as a rule the instruments called debentures are issued so that each person gets his own document and can deal with it separately. He has greater facility of dealing with it in the market than is afforded by this instrument, but it would be unreasonable to hold that because the obligation to pay and the security in favour of several persons is contained in one single document, therefore the instrument is not within the protection of the section. There would not be any principle in doing that. I do not see why a single debenture should not be given to half-a-dozen persons and still be a good debenture within the Act. In my opinion, therefore, this is a valid instrument.

One word upon the only case which it is necessary for me to mention, *British India Steam Navigation Company* v. *Commissioners of Inland Revenue* (1). The question there was one of interpretation of the *Stamp Act*, and it was necessary to find out whether the instrument then before the Court was a promissory note or debenture. In the schedule to the Act there were various definitions used which made it necessary to examine carefully that Act of Parliament. The decision that the instrument there was a debenture, has little or no bearing upon the case before me, because the question there was between the company itself and the Commissioners of Inland Revenue, and the company—as Lord Justice *Lindley* particularly pointed out during his judgment—were getting an advantage from issuing a document which they themselves called a debenture, and it certainly was a

(1) 7 Q. B. D. 165.

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1887
EDMONDS v. BLAINA FURNACES COMPANY.
BEESLEY v. BLAINA FURNACES COMPANY.

debenture within the terms of some portion of the Act of Parliament, although it might have been a promissory note within some other parts. But the company called it a debenture, and they got commercial advantage by so calling it. They meant it to operate as a debenture. Further, the company did not mean it to be a promissory note, and if, contrary to the contention of the company, the Court had held it to be a promissory note within the provisions of the *Stamp Act*, the instrument would have been void unless properly stamped before issued. I think that case has little or no bearing on the present. I determine this case upon the true nature of the instrument before me.

Solicitors: *Clements*; *C. A. Clulow.*

G. M.

In re GREGSON.
CHRISTISON *v.* BOLAM.

NORTH, J.
1887
June 22, 23, 25.

[1885 G. 2772.]

Mortgagee—Set-off—Administration Action.

G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mortgagees. After the death of *G.* the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy:—

Held, that they had no right to set off the balance against the executor in respect of arrears of the annuity.

THIS was a creditor's action to administer the estate of *Henry Gregson*, a testator who died in September, 1885. The executor was the sole Defendant. The estate was insolvent.

By an indenture dated January, 1847, *Henry Gregson*, the testator, granted an annuity of £1790, payable during his own life to the trustees of the *Provident Life Office*, and charged the annuity on certain real estate of which he was tenant for life. The payment of the annuity was secured collaterally by a warrant of attorney, and judgment entered up. By an indenture dated the 26th of February, 1881, indorsed on the last-mentioned indenture, *Henry Gregson* mortgaged his life interest in the real estate comprised therein to the trustees of the *Provident Life Office* for a sum of £4000 advanced by them to him.

By another indenture, also dated the 26th of February, 1881, between *Henry Gregson* and the trustees of the *Provident Life Office*, *Henry Gregson* assigned a policy on his own life for £5000 in the *Standard Life Assurance Association*, and the sum of £5000 thereby assured and all other moneys to become payable thereunder by way of bonus or otherwise, to the trustees of the *Provident Life Office*, subject to a proviso for redemption on repayment of the £4000 secured by the indenture of even date with interest on the 26th of August, 1881. The latter deed contained a power of sale, which provided that the balance of purchase-money after payment of the mortgage debt, interest, and costs, should be paid to the mortgagor, his executors, administrators, or assigns. There was no express declaration as to the application of moneys to be received under the policy on the death of the assured.

On the 26th of March, 1886, the *Standard Life Assurance Association* paid to the trustees of the *Provident Life Office* the sum of £5000 in respect of the policy on the life of *Henry Gregson* held by them on mortgage. There was then due in respect of that mortgage the sum of £4187 8*s.* 8*d.* There was at the same time due from the estate of *Henry Gregson* to the *Provident Life Office* the sum of £1099 9*s.* 6*d.* in respect of arrears of the annuity unpaid. The *Provident Life Office* claimed to set off the balance of the policy-money (£812 11*s.* 4*d.*) in their hands, after satisfying the mortgage debt with which it was charged, against a portion of the £1099 9*s.* 6*d.* due to them in respect of the annuity.

This was a summons taken out by the executor of the testator (the trustees of the *Provident Life Office* being Respondents, and submitting to the jurisdiction) to have it determined whether the trustees could retain the balance of £812 11*s.* 4*d.*, or ought to pay it to the executor.

Cozens-Hardy, Q.C., and *Warrington,* for the Executor:—

The law is settled that a mortgagee receiving money on a policy after the death of his mortgagor cannot set off or retain any balance over the amount due on the mortgage in respect of a simple contract debt due to him from the mortgagee outside his mortgage: *Talbot* v. *Frere* (1). It does not make any difference that the debt is a judgment debt: *Van Gheluive* v. *Nerinckx* (2). Nor can the *Provident Office* have any right to consolidate or tack, for the subject-matter of the mortgage to secure the annuity is gone, that is to say the security is gone, and there is nothing to consolidate with or to look to: *In re Raggett* (3).

Napier Higgins, Q.C., and *William Druce,* for the *Provident Office*:—

We put our case as an equitable right of set-off. There is a conflict of authority; the case of *Talbot* v. *Frere* before the late Master of the Rolls is directly in the teeth of two decisions by Lord *Romilly*, *Spalding* v. *Thompson* (1), and *In re Haselfoot's Estate* (2), and one by Vice-Chancellor *Malins*, *Ex parte National Bank* (3). All these decisions are recent, and in this conflict the Court will look at the case on first principles. There seems to be no principle in the decision of Sir *George Jessel* in *Talbot* v. *Frere* (4); he is driven to put the case as one of trusteeship: now there is no fiduciary obligation on a mortgagee who has received more than his debt, he is simply a debtor: *In re Alison* (5). The *Provident Office* having come into the possession of this money properly, ought to have the advantage of the possession: it is only natural justice that such set-off should be allowed, as Vice-Chancellor *Malins* puts it in the case of *Ex parte National Bank* (6). There are some similar remarks by Lord *Mansfield* as to set-off in *Green* v. *Farmer* (7); again in *Taylor* v. *Okey* (8) Lord *Erskine* recognizes an equitable right of set-off.

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(1) 9 Ch. D. 568.

(2) 21 Ch. D. 189.

(3) 16 Ch. D. 117.

Cozens-Hardy, in reply, on the question of set-off:—

The three cases relied upon before Lord *Romilly* and Vice-Chancellor *Malins* are not based on any right of set-off. There can be no set-off in respect of a debt due in one capacity and a credit in another capacity. A creditor of a testator cannot set off the debt due to him against a debt that became due to the executor of the testator: *Rees* v. *Watts* (9); *Newell* v. *National Provincial Bank of England* (10); *Hallett* v. *Hallett* (11); *Lambarde* v. *Older* (12).

Higgins, in reply on the latter cases:—

This case is distinguishable, for the debt and credit are really due and receivable in the same capacity.

June 25. NORTH, J.:—

The executor claims by this summons to have the balance in the hands of the Respondents, the mortgagees, as money received to his use. It is clear that claim is good unless there is something to displace it. The question is on what grounds the mortgagees can do that. Is it that they can consolidate? It is admitted that the decision of *In re Raggett* (1) is fatal to such contention. There cannot be a consolidation of two securities one of which has ceased to exist. Then can they tack? The same case is an authority that they cannot. And in point of fact Mr. *Higgins* says he cannot argue the case on that ground. Then upon what basis can they claim? It was put on three grounds: first it was said that they were in possession of the money and *melior est conditio possidentis.* They have got it, no doubt, and it is clearly money held by them to the use of the executor. Under the circumstances it seems to me fallacious to say, in a country where the law prevails, that the position of a man who has got in his hands money held to the use of another can be better off by the mere fact of his possession, without any legal right to justify it. In the next place the case is put on the ground of natural justice. When counsel addresses an argument on the ground of natural justice to a Court of Law, he addresses it to the wrong tribunal. In a Court of Law all that we can deal with is the law of the land, and upon that the late Master of the Rolls in the case of *Talbot* v. *Frere* (2) makes some remarks with which I entirely agree. He says: "There can be no natural justice in allowing one creditor of a testator, simply because he happens to have a mortgage, to retain the balance in favour of himself to the prejudice of the other creditors." Then the third ground on which the Respondents' case is put is a legal ground. It is said that they have a right to set off against the demand made upon them a debt due to them from the estate of the testator. It is clear that at common law if *A.* owes *B.* a sum of money and *B.* owes a sum of money to *A.*, each can bring a separate action, and there can be no set-off. To take another instance: if a man deduct a sum due to him from what he owes to another and tender the difference, there is no legal tender. In point of fact there can be no set-off except in cases in which the statute gives a right of set-off. I am not going to read the words of the statute, but the decisions are clear that a debt due by a testator in his lifetime, and for which

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(1) 26 Beav. 637.
(2) Law Rep. 13 Eq. 327.
(3) Ibid. 14 Eq. 507.
(4) 9 Ch. D. 568.
(5) 11 Ch. D. 284, 293.
(6) Law Rep. 14 Eq. 516.
(7) 4 Burr. 2214, 2221.
(8) 13 Ves. 180.
(9) 11 Ex. 410.
(10) 1 C. P. D. 496.
(11) 13 Ch. D. 232.
(12) 17 Beav. 542.

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(1) 16 Ch. D. 117.

(2) 9 Ch. D. 571.

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his executor was never personally liable, cannot be set off against a sum never payable to the testator at all, and in respect of which he never had a right of action, but which first became payable after his death, and then became payable to the use of the executor. If the power of sale had been exercised in the testator's lifetime, and the office had received a sum more than sufficient to satisfy what was due on the mortgage of the policy, and the testator had claimed the surplus, there might have been a set-off. That is not the event which has happened; and that there can be no set-off between a debt due by a testator and a debt accruing to his executor the cases of *Rees* v. *Watts* (1), *Newell* v. *National Provincial Bank of England* (2), *Lambarde* v. *Older* (3), and *Hallett* v. *Hallett* (4) furnish ample authority.

But then the counsel for the insurance office rely on three cases. The first of these is *Spalding* v. *Thompson* (5). In that case a policy which belonged to Lord *Suffield* was deposited by way of security with a man named *Thompson* to secure a sum of £500 advanced by *Thompson*, which was secured also by a warrant of attorney, and judgment entered up. There was subsequently a second judgment in respect of other money transactions by the same person against Lord *Suffield*. Then in June, 1849, Lord *Suffield* conveyed certain estates to trustees to secure payment to his judgment creditors, who covenanted not to enforce their judgments against his estate. Subsequently *Thompson* obtained a third judgment for a debt which did not come within the security of the trust deed. After the death of Lord *Suffield*, *Thompson* received the amount due on the policy, and he afterwards received out of the estate conveyed to trustees the amount of his two first judgments; and the result was that he received £500 more than was due on the two judgments. The executors of Lord *Suffield* asked to have that paid back. *Thompson* on the other hand asserted that the policy was his own, but offered to give up the £500 less what was due on his third judgment. Lord *Romilly* there said (6): "I regard it rather as the property or money of Lord *Suffield* come into the hands of *Thompson*, and

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(1) 11 Ex. 410.
(2) 1 C. P. D. 496.
(3) 17 Beav. 542.
(4) 13 Ch. D. 232.
(5) 26 Beav. 637.
(6) Ibid. 641.

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as if it had been a policy effected on the life of a stranger, which had been assigned by Lord *Suffield* to *Thompson* to secure the advance made by him. If that had been so, I am of opinion, that Lord *Suffield* could not have enforced payment of the money without payment of the third judgment for £221." If that is so the meaning of "advances made" must have included subsequent advances; but if not, the proposition of the Master of the Rolls must have been that there was a set-off by agreement. At any rate the case has no bearing on the present. Speaking of the trustees of the creditors' deed, which he did not think affected the matter, he said: "They were trustees of the surplus for Lord *Suffield*. The judgment debt was a charge on the surplus of the estate, which was the property of Lord *Suffield*. If the trustees had voluntarily paid the amount on the third judgment, could Lord *Suffield*, or his representatives, have insisted that the item was not to be allowed them in taking the account against them?" That case is therefore entirely distinguishable from the present and does not apply.

Then the next case is that of *In re Haselfoot's Estate* (1). That is a case in which the facts were very similar to those of the present case, and the head-note is this: "The mortgagees of a policy of assurance, mortgaged to them by a deceased testator to secure a sum of money, received after the testator's death, under the policy, a sum exceeding the amount due to them for principal and interest in respect of the mortgage debt. They were also creditors of the testator for other debts not secured:—*Held*, that they were entitled to retain the balance in their hands in discharge of their unsecured debts." The Master of the Rolls says (2): "The case of *Spalding* v. *Thompson* (3), which was cited, seems to me precisely in point. It is very true it is a decision of my own, but I do not find that it has ever been reversed or doubted. I have reconsidered the point as to whether the decision is right; I think it is, and I must be bound by it on the present occasion." As I have already pointed out the decision of *Spalding* v. *Thompson* seems to me not at all in point, for it was a decision on a very different state of facts. Then he goes

(1) Law Rep. 13 Eq. 327.
(2) Law Rep. 13 Eq. 331.
(3) 26 Beav. 637.

on to give his reasons. I do not see how that case can be relied on as furnishing an authority for the grounds on which the present case has been argued, namely, a right of set-off, for the Master of the Rolls said he considered it was not a case of set-off, but of something not very clearly defined. It was a case which was received at the time with a good deal of dissatisfaction, and I am not aware that it has ever been followed unless in the case of *Ex parte National Bank* (1); but in my opinion that case is no real authority upon the point. The facts were, as stated in the head-note, "A company deposited title deeds with a bank 'as collateral security for bills under discount.' At the time the company was wound up they were indebted to the bank in respect of other bills than those actually discounted for them, and the securities realised more than was sufficient to cover the latter bills:—*Held,* that the company could effect a mortgage by deposit of deeds without complying with the formalities required by their articles of association upon the execution of mortgage deeds; that the bankers were not in the position of officers of the company, who were bound to see that the required formalities were complied with, and that the bank was entitled to hold the balance of the proceeds upon the sale of the securities, to meet the whole amount due to them by the company." The argument of the claimant was addressed to the question whether there was a banker's lien, and in addition to that there is this remark by his counsel: "The same principle was applied to the case of mortgagees (who were not bankers) in *In re Haselfoot's Estate* (2) and *Spalding* v. *Thompson* (3)." That seems to have been because they were recent cases: but in point of fact they were quite distinct from the case then before the Court, so distinct that no argument on behalf of the liquidator was founded on them. The Vice-Chancellor made some observations on those cases, and then said: "It seems to me, on this general principle, that if *A.* creates a mortgage in favour of *B.*, and the mortgage being realised, he has the balance in his hands, natural justice would seem to point out that he would be entitled to retain the surplus and apply it in payment of a general debt due to him." That was a mere

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(1) Law Rep. 14 Eq. 507, 516.

(2) Law Rep. 13 Eq. 327.

(3) 26 Beav. 637.

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obiter dictum on a point not argued at all. Under the circumstances, without any disrespect for the learned Judge, it would not do to give too much weight to it. It seems to me, therefore, that those cases do not furnish any authority for the disposal of this. But *Talbot* v. *Frere* (1) is a case precisely in point. Apart from that I feel entitled to disregard the three other cases, and I certainly do not feel the less so because the late Master of the Rolls disregarded them before me. Then it is said that case is not itself an authority, because it did not rest on any sound principle: it is said to be incorrect, because the Master of the Rolls said that a mortgagee is a bare trustee, though the Courts have repeatedly said that he is not a trustee. He is not a trustee in the ordinary sense. But I know of no case in which it has been said he is not a trustee in any sense. In the case of *Roxburghe* v. *Cox* (2), Lord Justice *James*, whose attention had been called to *Talbot* v. *Frere,* said "that was a case of trustee and *cestui que trust;*" but, independently of that, the remark that the mortgagee was a bare trustee merely meant that he had no independent claim of his own. I think it doubtful whether in this case the Respondents can strictly speaking be said to be trustees: but that is immaterial. It is clear to me that the balance in the hands of the Respondents is money received to the use of the executor, in respect of which there is no right of set-off, and an order must be made in terms of the summons, with costs.

Solicitors for Executor: *Crossman, Crossman & Prichard.*

Solicitors for Trustees of the *Provident Life Office*: *Burrows & Barnes.*

(1) 9 Ch. D. 568.

(2) 17 Ch. D. 520, 525.

D. P.

In re WILLIAMS' TRUSTS.

NORTH, J.

1887
July 9.

Appointment of new Trustees—Death of sole Trustee in Lifetime of Testator—Death of Testator's Heir intestate—Form of Vesting Order—Trustee Act, 1850 (13 *&* 14 *Vict. c.* 60), *ss.* 32, 34 [*Revised Ed. Statutes, vol. x., p.* 990]—*Conveyancing and Law of Property Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 30.

The sole trustee of land appointed by a will died in the lifetime of the testator. The testator's heiress-at-law died intestate (after the *Conveyancing Act,* 1881, had come into operation), and there was no representative of her estate :—

Held, that, on a petition for the appointment of new trustees of the will, which was served on the testator's heir, an order could be made vesting the property in the new trustees for such estate as was vested in the heiress-at-law at the time of her death.

PETITION under the *Trustee Acts* for the appointment of new trustees of the will of *Thomas Williams,* who died on the 4th of June, 1876, and for a vesting order in respect of real estate and stock of which the trust estate consisted. By his will, dated the 22nd of September, 1862, the testator devised and bequeathed all his real estate and the residue of his personal estate unto his brother, *David Williams,* his heirs, executors, and administrators, upon the trusts therein declared, and also appointed him his executor. The will contained no power for the appointment of new trustees. *David Williams* died on the 21st of October, 1865. At the time of the testator's death his heiress-at-law was *Mary Jenkins.* She died on the 13th of March, 1882, intestate, leaving her son, *D. W. Jenkins,* her heir-at-law, and he then became the testator's heir-at-law. At the time of his mother's death he was under twenty-one. Limited administration to her estate was granted until he should become of age. At the time when the present petition came on for hearing he had attained twenty-one, and there was no legal personal representative of his mother. The petition was served on him.

Bardswell, for the Petitioners :—

As the testator's heir is before the Court there is jurisdiction under the *Trustee Act* to appoint a new trustee : *Gunson* v.

Simpson (1); *In re Smirthwaite's Trusts* (2). The only difficulty arises by reason of sect. 30 of the *Conveyancing Act*, 1881, which provides that "Where an estate or interest of inheritance . . . in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him." There being no personal representative of the deceased heiress-at-law, who was the trustee, it is doubtful in whom the legal estate in the trust property is now vested, and the question is whether it is necessary that representation to her estate should be taken out, and the petition served on the representative when constituted. A somewhat similar point arose in *In re Pilling's Trusts* (3) and *In re Rackstraw's Trusts* (4).

G. Melville Dale, for *D. W. Jenkins*.

Simmonds, for another Respondent.

NORTH, J.:—

I feel no difficulty in making an order vesting the property in the new trustees for all such estate as was vested in *Mary Jenkins* at the time of her death. I will make the order in that form.

Solicitors: *Burton, Yeates, & Co.*; *S. B. Somerville*.

(1) Law Rep. 5 Eq. 332.
(2) Ibid. 11 Eq. 251.
(3) 26 Ch. D. 432.
(4) 33 W. R. 559.

W. L. C.

In re YORK.

ATKINSON *v.* POWELL.

[1886 Y. 138.]

STIRLING, J.

1887

March 31; *April* 2; *July* 11.

Insolvent Estate—Action for Administration—Judgment, and Proceedings thereunder—Jurisdiction to order Transfer of Action to County Court—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 125—*Discretion of Court.*

Under sect. 125 of the *Bankruptcy Act*, 1883, a transfer to the County Court may be ordered after judgment and further subsequent proceedings in the administration action.

Any right of retainer of the legal personal representative, when the transfer will be for the benefit of the creditors generally, cannot be permitted to stand in the way of a transfer being ordered.

MOTION.

The action was brought on the 29th of July, 1886, by a creditor of *James Neal York*, deceased, against the administratrix of his estate (with the will annexed) for the administration of the testator's estate. Judgment for administration was pronounced in October, 1886. Advertisements for creditors to come in and prove their claims were issued, and 127 were sent in. A complaint was made that the Plaintiff was not going on with the action, and an order was on the 26th of November, 1886, made giving the conduct of the action to Messrs. *Hammond & Co.*, bankers, who claimed to be creditors, and having got that order they, on the 13th of December, 1886, took out a summons asking—not for a transfer to the County Court—but for further inquiries in reference to deeds, securities and writings which any clients of *J. N. York* (who was a solicitor at *Newmarket*) were entitled to have delivery of, and whether any of such documents were subject to a lien for costs or otherwise. Some of the claims sent in were by former clients of the deceased debtor in respect of moneys alleged to have been received by him and not accounted for to them. The administratrix, the Defendant, who resided at *Chislehurst, Kent*, was a creditor, and her claim was very much greater in amount than the claims of the other creditors. On the 10th of March, 1887, the Defendant filed an affidavit which set forth that a large number of the claims were disputed; and it appearing that a large majority of the claimants, whose claims were disputed, resided at or near to *Newmarket*, Messrs. *Hammond & Co.* gave notice of a motion for an order of transfer of the action to be made to the County Court of *Cambridge*, the district in which the debtor resided at the time of his death. It appeared that the administratrix had received some assets and had paid into Court the sum of £480.

Hastings, Q.C., and *F. H. Colt*, for Messrs. *Hammond*:—

They have the conduct of the action, and are creditors for more than £50, and that brings them within sect. 6 of the *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52). Everybody agrees that the testator's estate is absolutely insolvent. The County Court holden at *Cambridge* is the Court to which the action should be transferred, and it will be for the Defendant, the legal personal representative, to satisfy the Court that the transfer ought not to be made. It was not until the claims were sent in that the insolvency of the estate, which was sworn under £6000, was ascertained; up to the present time everything done has been mechanical. The most costly part of the proceedings in the action, the getting in the estate, and the proof of and the adjudication upon the claims remain to be done, and as the great majority, or about two-thirds, of the claimants, most of whose claims are disputed, reside at or near to *Newmarket* the proceedings can be carried on at *Cambridge* at much less cost than in *London*. The motion is not too late, as it was not till the 10th of March that the affidavit of the administratrix was filed. Before that date the creditors could not know of the estate being insolvent, and the notice of motion is dated the 21st of March.

W. Pearson, Q.C., and *Vernon R. Smith*, for the Defendant, the administratrix:—

She is the largest creditor, and her claim is larger than all the others put together and therefore the most interested in the economical winding-up of the estate. The motion is not supported by any other creditor than the applicants. The questions which have arisen in reference to the claims are very complicated, and they ought not to be remitted to the Registrar of a County Court. Except for the allegation of insolvency of the estate, which must be proved, and the *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), the action could not be remitted to the County Court. The 125th section of the Act shews what may be done (1).

It is submitted that upon the true construction of the section the Court has no jurisdiction, after an order has been made for administration, to make a transfer. The County Court is not to carry out the order of the Court of Chancery, but to make an order for administration of the estate (sub-sect. 4). If an action is commenced by a creditor in Chancery for administration, and the Court has not pronounced judgment, then the creditor may

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(1) Sect. 125: "(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the Law of Bankruptcy."

That "(2.) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may upon cause shown dismiss such petition with or without costs."

That "(4.) A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate, but that Court may in such case, on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned Court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor."

That "(5.) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the Court, as trustee thereof, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act."

That "(7.) In the administration of the property of the deceased debtor under an order of administration, the official receiver shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims shall be deemed a preferential debt under the order, and be payable in full, out of the debtor's estate, in priority to all other debts."

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in that case apply to have the action transferred, and the Bankruptcy Court may pronounce the judgment which the Chancery Court could have done.

[STIRLING, J.:—That reduces the construction of the section to a small matter.]

If the Court has jurisdiction it will not in its discretion exercise it in this case. Here the Court has pronounced judgment, and under it the proceedings in the action have been going on. The sub-sects. 1, 2, and 4, shew what will follow after a Court of Bankruptcy has made an order for administration, and then by sub-sect. 5 the estate is vested in the official receiver of the Court. That must mean upon an order being made, because the appointment of such an official will displace the legal personal representative. This is clearly a matter within the discretion of the Court, which should consider what has been already done by its own officers in Chambers. The only things remaining to be done are the realizing of the estate, and adjudicating upon the claims, and, having regard to the progress already made, it is submitted that those matters will be more cheaply and expeditiously disposed of by this Court. The Defendant, the largest creditor, resides near *London*, and the principal question will be between her and the bankers. It will be one of great difficulty, and should not be remitted to the Registrar of a County Court, sitting as a Judge, to decide it: *Ex parte May* (1). There will be other questions of great difficulty in reference to the investment of moneys by the deceased debtor, and they ought not to be remitted to a Registrar of a County Court; further than that, the bankers now moving have not proved their debt: *In re Weaver* (2). The object of the bankers is to get a vesting of the estate in the official receiver, and to prevent the legal personal representative raising the question of her right of retainer, which she clearly ought to be allowed to enforce, certainly against the sum of £480 which she had paid into Court, and these considerations make this case very different from that of *Senhouse* v. *Mawson* (3).

(1) 13 Q. B. D. 552.
(2) 29 Ch. D. 236.
(3) W. N. 1885, p. 119.

Hastings, in reply:—

[STIRLING, J.:—Having regard to the case of *In re Weaver* (1) there seems to be a question whether the bankers should not have proved their debt.]

The legal personal representative has not disputed it, and the cases of *Senhouse* v. *Mawson* (2) and *In re Weaver* shew that the Court has jurisdiction, and what in its discretion it will do; and acting upon that discretion here this case should be transferred to the County Court at *Cambridge*, particularly as the proceedings which have already been taken will be adopted by the Court of Bankruptcy.

STIRLING, J.:—

In this case I am asked to exercise the jurisdiction conferred upon the Court by sect. 125, sub-sect. 4, of the *Bankruptcy Act*, 1883, and to transfer to the proper Bankruptcy Court, which in this case is the County Court at *Cambridge*, the action for the administration of the estate of a debtor, deceased, and which was commenced in this branch of the Court last July. [His Lordship read sub-sects. 1 and 4 of sect. 125, and continued:—] In the first place, the transfer asked for is to be made "on the application of any creditor," as to which I shall say something presently; and in the second place, there is to be "proof that the estate is insufficient to pay its debts." As to that I think it has clearly been made out that the estate is insufficient, so that that requirement is satisfied in this case. The next question is, have I jurisdiction to make an order of transfer in this case, seeing that the usual creditor's administration judgment has already been given by this Court? The words of sub-sect. 4 are, "a petition for administration . . . shall not be presented to the Court after proceedings have been commenced in any Court of Justice for the administration of the deceased debtor's estate, but that Court may in such case on the application of any creditor . . . transfer the proceedings." It was contended that the jurisdiction to make an order for transfer is limited to the period between the commencement of

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(1) 29 Ch. D. 236.

(2) W. N. 1885, p. 119.

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the action and the giving of the judgment for administration; but I think that that is too narrow a construction of the section. The action was commenced, and in it proceedings have been going on and are not concluded. The judgment which was given is only in process of being worked out, in fact the working out has only just been commenced. The same objection as raised here appears to have been taken in the case before Mr. Justice *Pearson* of *In re Weaver* (1), and was not, as it seems, favourably regarded by him. It also appears that in the case of *Senhouse* v. *Mawson* (2) an order for transfer was made by Vice-Chancellor *Bacon* notwithstanding that judgment for administration had been given. It appears to me, therefore, that I have jurisdiction to make the order, provided that the circumstances of the case are such that it can properly be made. The jurisdiction is, as it appeared to Mr. Justice *Pearson* and as it appears to me, discretionary; and in the exercise of that discretion, supposing there are no special circumstances, and that the application is made just after the proceedings have been commenced, the predominating considerations, must, I conceive, be those of convenience, delay, and expense. I have since the motion was heard had an opportunity of looking into the matter, with the assistance of the Chief Clerk, and supposing the application had been made to me immediately after the proceedings were commenced, and that I had to decide upon the materials before me, I should come to the conclusion that as regards convenience there is some, though not a very great preponderance in favour of the County Court, and as regards delay and expense, there is in all probability a considerable preponderance in favour of the County Court; and on these grounds, if the application had been made to me immediately after the commencement of the action I should have made an order for the transfer to that Court. Then arises the question whether there are any special circumstances which ought to induce me to abstain from making an order in this case? It was contended that the Applicants are too late, and that the expense of the proceedings taken in this Court would be thrown away. As regards the application being too late, no doubt some steps have been taken in the action by the creditors, on whose behalf the application has been made, since the judgment for administration was given. But on a question of this sort, where the matters for consideration are the benefit and convenience of all parties interested in the action, I think that too great weight should not be given to the steps taken by any particular creditor. However, in this case I think that the Applicants have come to the Court quite early enough. They came with their motion as soon as it was sufficiently indicated by the proceedings in Chambers that the estate was insolvent. It was also contended that the expense of the proceedings in the action would be thrown away; but, on the other hand, it was stated in argument that the practice in the Bankruptcy Court in the case of a transfer is to take up the proceedings as nearly as may be at the point at which they have arrived in this Court. I have had an opportunity of seeing and of making inquiries on the subject of the Judge of the High Court to whom Bankruptcy matters have been assigned, and I have ascertained from him that that is a correct statement as to the practice, and that if an order for transfer be made the proceedings will be taken up as nearly as may be, if not precisely, in the position in which they will leave this Court. I was also desirous of ascertaining whether any proceedings have been taken in Chambers which will have to be gone over again if the action be transferred to the County Court, and whether anything will be lost by that being done, and upon inquiry I found from the Chief Clerk that there will not be any loss. The matter stands thus: A list of creditors has been brought in but no adjudication on any of the claims has been made; and as regards the other inquiries the usual affidavit by the administratrix, the Defendant, has been brought in. No other proceedings have been taken, and I do not think that anything has happened which will lead to costs being thrown away if the transfer of the action be made.

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(1) 29 Ch. D. 236.

(2) W. N. 1885, p. 119.

Then other suggestions were made as regards the position of the administratrix. It was contended that her right of retainer may be interfered with, and that she may lose some costs properly payable to her in the action.

As regards the right of retainer I will say nothing. That is a matter which will have to be considered by the Judge in Bankruptcy. So far as regards that question I think that I ought to treat the case as being in the same position as if no proceedings had been commenced in this Court and the creditors had commenced proceedings under sect. 125 of the *Bankruptcy Act*, 1883, sub-s. 1, and presented a petition for the administration of the estate according to the law of bankruptcy. In such a case I do not think that weight would be given to the fact that the legal personal representative is also a creditor. Although this Court never interferes with the legal right of an executor or administrator to retain his debt, yet the right of retainer does operate prejudicially to the rights of the creditors generally; and while I do not think as at present advised that the existence of the right of retainer should be made a ground for ordering a transfer, still if on other grounds the transfer appears to be for the benefit of the general body of creditors, I do not think that the right of retainer should stand in the way of the transfer being made. Next it was pointed out that the administratrix may be deprived of some costs incurred in the proceedings; but sub-sect. 7 of sect. 125 enacts what the official receiver is to have regard to in the administration of the estate. Perhaps the language of the sub-section is not so clear as regards testamentary expenses as it might be. [His Lordship read the sub-section, and continued:—] But looking at the fact that the order for transfer will merely effect a change of *forum* and place in which the administration takes place, and that the rights of the legal personal representative are not intended, as I imagine, to be interfered with in any way, I think that the words "testamentary expenses incurred by him in and about the debtor's estate" ought upon the true construction of the section—as would be the case upon the construction of a will—to be held to extend to costs, charges, and expenses properly incurred in reference to any proceedings in the action; and therefore I come to the conclusion that an order for transfer will not prejudice the administratrix in any way. Some suggestions were made that the County Court is not a proper Court to deal with the case. That is not a matter for me to consider. The Legislature has settled that by the statute; and it must not be forgotten that if the debtor had been made a bankrupt immediately before he died the County Court would have been the Court in which all the proceedings would have

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taken place, and there the estate would have been wound up. Then it was said that the country solicitor of the Applicants happens to be the solicitor who usually acts for the official receiver in the *Cambridge* District Courts. That is a matter with which I cannot interfere; but it is a subject for the consideration of the official receiver, and no doubt the solicitor will feel it to be his duty to communicate to the official receiver if he should desire to have his services, the fact that he appears also for these creditors; and the official receiver, who is a servant of the Board of Trade, will look into the matter. He cannot, I believe, without the sanction of the Board employ a solicitor at all, and I feel sure that neither he nor the solicitor will do anything which will be wrong in that respect or expose them to the censure of the Board. Upon all these grounds it appears to me that there is no valid objection to the order being made; and I think that it will be beneficial to the creditors that the transfer should be made.

There remains another question. The *Bankruptcy Act*, 1883, sect. 125, sub-sect. 4, enacts that the Court may "on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings," and sub-sect. 10 enacts that creditor "means one or more creditors qualified to present a bankruptcy petition, as in this Act provided," and sect. 6 of the Act shews what the qualification is—a debt amounting to £50. The position of the matter as regards that is, that the Applicants claim to be creditors holding a security for a general balance of account, and they claim also to be creditors for a sum of £80, money had and received. Neither of the claims has been admitted by the administratrix, and the Applicants have not given full particulars in reference to their claims: therefore it is left uncertain to my mind at the present moment whether they have fulfilled the conditions required by the Act; but seeing that the administratrix has not in her affidavit thought fit to distinctly challenge the claims, I think that the Applicants ought to have an opportunity of supplying the deficiency in this respect. Accordingly I shall not make an order of transfer now, but give the Applicants an opportunity of furnishing particulars of their claims to the administratrix, and if it should be necessary of going into evidence in regard to them: but I desire it to be understood that I do not give any encouragement to the administratrix to do more than her duty in investigating them. I do not desire her to take any hostile proceedings, or to put the Applicants to any unnecessary expense. If that should be done I shall deal with the costs of it. I think that the better course will be to direct the motion to stand over in order that the claims of the Applicants may be made out, and if necessary be verified by an affidavit. The application will go to Chambers, and if upon looking into the matter the administratrix admits that there is a sufficient amount of debt, or it be proved, the order will then go without any further mention of the application to the Court, but no order must be drawn up at present, and the costs will be costs in the action.

1887. July 11. The application was on this day brought before Mr. Justice *Stirling* in Chambers, when his Lordship held that the Applicants had established a debt to the amount of £50, and directed that the order for transfer of the action to the County Court should be drawn up; and that the order should be without prejudice to any application which might be made in that Court in reference to an objection which had been raised on behalf of the administratrix to the Applicants' claim so far as it exceeded £50.

Solicitors: *Aldridge, Thorn & Morris,* agents for *Fenn, D'Albani & Ellis, Newmarket; Gibbs & White.*

T. F. M.

COLLINS *v.* CASTLE.

KEKEWICH, J.

1887

June 7, 8.

[1886 C. 2129.]

Vendor and Purchaser—Restrictive Covenant—Rights of Purchaser—Building Land—Injunction.

An estate was laid out for building, and a great part of it had been sold. In 1882 some of the unsold part was put up for sale by auction with a condition that the purchaser of certain lots was to covenant to expend on each of the dwelling-houses built not less than £1200. As to some lots there were other restrictions; and some were free from restriction. One of the Plaintiffs bought some of the free lots, and also a restricted lot, not being one of the first-named. Next year the unsold lots, together with another piece of land forming together the whole of the unsold parts of the estate, were put up for sale, with similar conditions as to the first-named lots; but as to other lots free from restrictions. All the lots were then sold, except the first-named lots, both Plaintiffs being purchasers of free lots. The first-named lots were in the following year sold to the Defendant, who entered into a covenant with the vendors not to build houses of less value than £1200. He now proposed to build houses of less value:—

Held, that the doctrine of *Nottingham Patent Brick and Tile Company* v. *Butler* (1) ought to be extended to cover the present case, and that the Plaintiffs were entitled to restrain the Defendant from building houses of less value.

The Plaintiff in such a case is not obliged to prove damage in order to obtain an injunction.

THE Marquis *Camden* had in 1856 and 1857 laid out estates near *Tunbridge Wells*, then called the *Camden* estate and *Bayham* estate, and had sold part of them for building. He died in 1875. In 1882 the only remaining part of the estate, near *Tunbridge Wells*, was that marked by figures and by the letter A in the annexed plan. It seemed to be then called the *Camden Park* estate. The trustees of the will of the Marquis *Camden* in 1882 put up for sale by auction the part of the estate marked with figures 9 to 31 in the annexed plan, together with eight pieces of land at *Pembury*, about two miles off, forming lots 1 to 8. Amongst the conditions were that the purchasers of lots 9, 10, and 11 were to enter into a deed of covenant with the trustees, their heirs, successors in estate, and assigns, and other the person or persons for the time being entitled to the rents and profits of the unsold

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(1) 15 Q. B. D. 261; 16 Q. B. D. 778.

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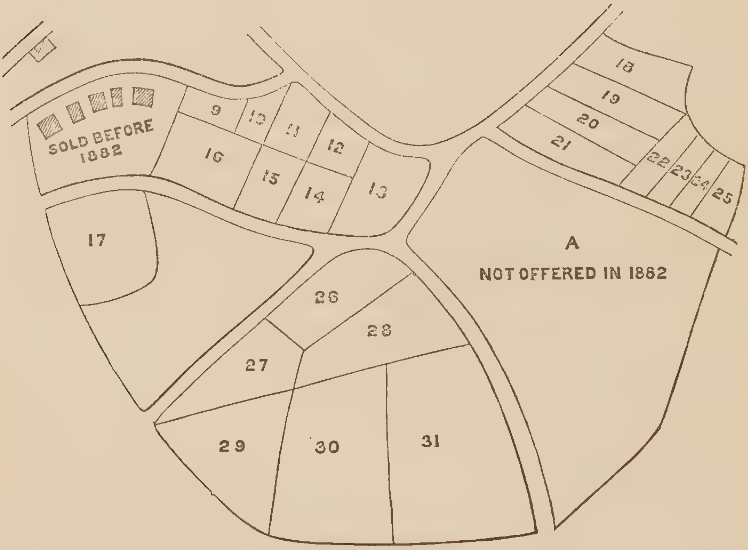
part of the *Camden* estate, similar to that entered into by previous purchasers of the *Camden Park* estate with the Marquis *Camden;* and in addition covenant to erect only one dwelling-house on each plot, and to expend in the erection of such dwelling-house the sum of £1200 at the least. The purchasers of lots 12 to 16 were to enter into a covenant not to build more than one house on an acre, and to spend on each house £1200 at least. The purchasers of lot 21 and of lots 26 to 31 were to erect on each lot one dwelling-house only, and to expend thereon £1000 at the least.



As to lots 17, 18, 19, 20, 22, 23, 24, and 25 there were no building restrictions.

At this sale the Plaintiff, *B. H. Collins,* bought lots 18 to 25 for £5280, and they were conveyed to him subject to the covenant as to lot 21. The only other lot sold at that sale was lot 17.

In July, 1883, the land unsold at the previous sale, together with the piece of land marked A, divided into lots, being the whole of the estate then unsold, was put up for sale with similar conditions as to the houses to be built on lots 9 to 16, but as to some other lots without restriction as to building. The plan annexed shewed what had been sold. All the lots were then sold except 9 to 16, some of those without restriction being bought by the Plaintiff, *B. H. Collins*, and some by the Plaintiff, *J. S. S. Douglas.*

In 1884 the trustees agreed to sell to *F. J. Castle* the lots 9 to 16, subject to the former conditions, and on June 4, 1885, they conveyed those lots to him. By a deed of the same date *F. J. Castle* covenanted with the trustees, their appointees, heirs, and assigns, and others the person or persons for the time being entitled to the receipt of the rents and profits of such of the lands now or heretofore part of the *Camden Park* estate as had not been sold since the death of the Marquis *Camden* (amongst other things), to erect only one dwelling-house on lots 9 to 11, at a cost of £1200 at least for each house; and as to lots 12 to 16 not to erect anything but dwelling-houses with not less than an acre of land attached, or of less value than £1200.

B. H. Collins and *J. S. S. Douglas* brought this action, alleging that the Defendant *F. J. Castle* intended to build on the land so bought by him houses of a less value than £1200; and claiming an injunction to restrain the Defendant from dealing with his land in breach of the restrictive conditions affecting the same and the covenants entered into by him.

Warmington, Q.C., and *Chadwyck Healey,* for the Plaintiffs:—

The property was put up for sale at one time, and the Court must consider what was held out to the purchasers. The Plaintiffs are entitled to keep the Defendant to his covenant. He had notice of the previous sale and of the purchase by the Plaintiffs. *Nottingham Patent Brick and Tile Company* v. *Butler* (1) is decisive on the subject.

Barber, Q.C., and *Heath,* for the Defendant:—

In that case all the land of the vendors was offered for sale, and subject to similar conditions. Here it was not so. In other cases there have been mutual covenants; here the Plaintiffs have bought land free from restriction: *Western* v. *MacDermott* (2); *Keates* v. *Lyon* (3); *Master* v. *Hansard* (4). There has been a difference between the principles of law and equity in these cases: *Pollock* on Contracts (1); *Renals* v. *Cowlishaw* (2). The Defendant has entered into an express covenant on the subject, and the Court cannot extend it to anything outside. We do not dispute that the Defendant was aware of the previous attempted sales; but that does not affect the question. If the Plaintiffs were to have these rights, why was it not expressed. There are covenantees who could sue, but the Plaintiffs are not, and obviously could not induce a covenantee to join them. The fact is, that they want to prevent the land from being built on, and know that it will not answer to build these expensive houses, and so hope to stop building altogether. The conditions have been varied at different times, and some of the land has been on the second sale sold free from restriction. If the vendors had sold this land free from restriction, would the Plaintiffs have any claim against either the vendors or the Defendant? And yet how can that affect the Plaintiffs? This is not a case where the estate is all subject to similar restrictions.

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(1) 15 Q. B. D. 261; 16 Q. B. D. 778.

(2) Law Rep. 2 Ch. 72.

(3) Law Rep. 4 Ch. 218.

(4) 4 Ch. D. 718.

Evidence was given as referred to in the judgment.

KEKEWICH, J. (after stating that the Plaintiffs could not maintain this action as on the covenant entered into by the Defendant, as they were neither appointees, heirs, or assigns of the trustees, having purchased before the covenant was made, nor persons entitled to the rents and profits, proceeded):—

In fact that is not the question which I have to decide. That question I apprehend to be: Are the Plaintiffs entitled as a matter of inference from all the facts and circumstances of the case, or in other words, can the Court see in those facts and circumstances an intention that the Plaintiffs were to be entitled to the benefit of conditions restricting the use of their neighbours' property? That is the real question, and it is a question which, but for the *Nottingham Patent Brick and Tile Company* v. *Butler* (3), would have made it necessary for me to look into many authorities and consider whether the doctrine to be evolved from them fitted the present case or not. I am, however, relieved

(1) 4th Ed. pp. 226–231.

(2) 9 Ch. D. 125.

(3) 16 Q. B. D. 778.

from this task by that case. Not only is it the most recent case, not only is there a considered and elaborate judgment of Mr. Justice *Wills*, but it has been approved of by the Court of Appeal (1), and approved of as stating the doctrine of the Court on this particular subject, as in fact a summary of the law on the subject. It did not profess to lay down a new principle. On the contrary, it professed to be only the statement of the doctrine of the Courts of Equity applied according to the principles of the *Judicature Acts* in the Queen's Bench Division. Mr. Justice *Wills* professed to follow the prior decisions in the Court of Chancery, and he did so, laying down what he states to be the principle. Perhaps, if I may venture to criticise the learned Judge's language, it is scarcely a principle in a logical sense: it is really a statement of the law. But whether it is a principle, or whether it is a statement of the law, it is equally valuable and equally binds me. He states the principle or the law to be that deducible from the cases, namely, that (2) "where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit."

Now it is to be observed that the Master of the Rolls in giving judgment in that very case on appeal says (3): "I think that Mr. Justice *Wills*' view of the law on this subject is perfectly correct. In my view he is right in saying that;" then follows a statement of what the Master of the Rolls lays down to be the law, which is not a repetition of or a quotation from Mr. Justice

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(1) 16 Q. B. D. 778.
(2) 15 Q. B. D. 268.
(3) 16 Q. B. D. 784.

Wills' judgment, but a statement of what the Master of the Rolls himself considers, as I read it, to be the law on the subject; but it is not intended to differ, and it does not substantially differ, from Mr. Justice *Wills*' own statement. Lord Justice *Lindley* also having first dealt with the other parts of the case, adds in a separate part of his judgment (1): "I wish to add that I think the way in which Mr. Justice *Wills* has treated *Keates* v. *Lyon* (2) and that class of cases is correct, and that it is an inference of fact in each case whether the purchasers are bound *inter se* by such covenants." I therefore have not merely Mr. Justice *Wills*' statement of the principle guiding the Court, but I have the opinion of the Court of Appeal expressly given by Lord *Esher* and Lord Justice *Lindley* that that statement is correct. Therefore I have that to guide me, and I think it would be improper of me to consider whether it is the statement which I myself should have deduced from these cases or not. In saying that, of course I do not mean for a moment to suggest that I should not have deduced the same principle if I had stated it in my own language.

With reference to some of the arguments, I wish to add that I can see that in applying the *Nottingham Case* (3) and the doctrine there laid down to the present case, I am to some extent extending the doctrine, in this sense, that I am applying the doctrine there laid down to a different set of facts—a set of facts, perhaps, not contemplated by either of the learned Judges who dealt with that case. But extension of the doctrine of any case is in certain circumstances not only legitimate and right, but inevitable. For a Judge to extend a doctrine by applying it to a different subject altogether is hazardous, and may be exceedingly wrong; but to extend it to a different set of facts from that which has been found before is merely the application of principles to details, which it is the duty of the Court every day to do. Also with reference to other remarks that have been made I wish to say that I do not intend or desire, any more than the learned Judges in that case intended or desired, to decide questions which have not arisen. I can see that the *Nottingham Case* and this case may suggest and may leave open a variety of questions of considerable interest which will probably occupy some future editor of learned works on vendors and purchasers, and probably we shall have to wait some few years before the doctrine is thoroughly elaborated. Supposing that the vendors in this case had thought fit to accede to Mr. *Castle's* request to be relieved from these conditions, either before or after the purchase, either before the contract was signed or afterwards, when he desired to dispose of the property and found that there was a difficulty in doing so, what would have been the position of the Plaintiffs? Could they still have sued Mr. *Castle*? Could they have sued the vendors? Is there any right of a purchaser under such conditions as exist here to insist on conditions being entered into and being fulfilled when there has been no express contract by the purchaser that they shall be fulfilled? Those are questions in different forms which I only throw out. They will, no doubt, give rise to litigation hereafter. They do not arise here at all.

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(1) 16 Q. B. D. 791.

(2) Law Rep. 4 Ch. 218.

(3) 16 Q. B. D. 778.

Passing then to this particular case, I hold that, taking Mr. Justice *Wills'* language, it is difficult—and more than difficult—it is impossible, to resist the inference that the conditions with which we are dealing here were intended for the common benefit of the purchasers, and I also hold, applying his language to the particular case, that the Plaintiffs bought on the faith that the conditions which they now seek to enforce would be observed over the property of the common vendor. Those two points struck me at an early period of the case as being the two which one would have to consider, and I find that they also are put forward by Mr. Justice *Wills*.

Now this difficulty certainly has occurred to me, and has had to be dealt with by counsel in argument. Does this principle, as laid down, apply only to a case where the common vendor is putting up for sale the whole of his property and intending to sell the whole, if he can, at once, or as soon as circumstances permit? Or does it apply also to cases where he either retains or declares his intention of retaining a portion for himself? The Master of the Rolls in affirming Mr. Justice *Wills'* judgment points to the conclusion that if the doctrine is to be extended to other cases than where the whole of the property is put up for sale and sold, that is not what he at any rate

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means to decide. But then I must bear in mind that the Master of the Rolls' judgment was given in a case where he found as a matter of fact that there was a sale of the whole of the property. That was a part of the case which he concluded before considering the doctrine applicable to the facts and circumstances. I find nothing in the Master of the Rolls' judgment to shew that he would have held differently or would have differed from Mr. Justice *Wills* if some other elements of detail were added or were wanting. No doubt he does point to the whole property being put up for sale. He says (1): "The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others." I must read that judgment with reference to the case before the Court, where the whole of the property had been put up for sale, and was intended to be sold. The Master of the Rolls is obviously reserving to himself the liberty of dealing with a case like the present when it arises. I do not find that the other Judges in the Court of Appeal referred to that in any way, though Lord Justice *Lindley*, as I have already said, approved the judgment of Mr. Justice *Wills*. That learned Judge certainly did not intend to say that it was necessary to the application of the principle which he laid down that all the property should be put up for sale, and that there should be no part retained, because he in more than one passage points to the whole property being sold as cogent evidence and an important item in the consideration of the case; and if he had meant to say, or it had occurred to him that he ought to say or ought to hold that the sale of the whole property was an essential part of

(1) 16 Q. B. D. 785.

the doctrine, he must have said so, and he could not have said what he did say in his judgment.

I am not called upon to apply the doctrine to a case where an owner of a property has put up for sale part of that property, reserving to himself any considerable portion. I am not applying it to a case where a vendor is only selling part of the property—where it is in any sense a sale of part of a large property. I am applying it to a case where he is really desirous of selling the whole, though not desirous of selling the whole at one and the same time. It seems to me that to narrow the doctrine to a case where all the property is put up for sale at once by one auction, according to one scheme, once and for all determined, never to be departed from, would be to narrow the doctrine far too much, and to give it a restricted application which can never I think have been intended. Here I find that in 1856 the Marquis *Camden* determined to sell part of his property, which might conveniently be called the *Camden Park* estate. In 1857, having then sold some parts, he seems to have contemplated the sale by degrees of the whole of the property, and with the assistance of his agent he had prepared plans, mapping the whole out in lots. I think that is important, and is admissible in evidence to shew the intention of the Marquis, through whom the trustees claim. I do not think it is important or admissible in evidence for any other purpose, because there is no evidence to shew that this was communicated to the Defendant when he purchased in 1884. But in 1882 the property was put up for sale by the trustees of the will, and in the conditions of sale the property is marked out in such a way as to shew that by no means only that property which was then offered for sale had been in the market, because there are several houses which had then been built, and though the property is not all marked out or divided into lots or numbered, still there is that fact that there are no less than five houses marked as built on the *Camden Park* estate. However, that perhaps is of little importance as regards the present Defendant, because he did not buy subject to those conditions. It may be important as regards one of the Plaintiffs who bought at that time. But in the plan annexed to the conditions of 1883 I find not only those five houses which had been built before 1882 again marked, but I find two properties marked as sold, one in the extreme left of the plan, the other being that which was sold to the Plaintiff *Collins.* That plan included property which had never been included before, and the Defendant who bought subject to the conditions of 1883 had express notice on the face of that plan that the whole of this property had been or was then laid out in building lots intended for sale in one general scheme. I cannot but think that we have it here shewn that the intention of the vendor was from first to last to sell, as and when circumstances permitted, the whole of the property and convert it into building land, a thing which cannot be done in the neighbourhood of *Tunbridge Wells* or anywhere else in a hurry, and requires the exercise of judgment in dealing with land. I think that is enough for the application of the doctrine.

Some difficulties are raised apart from that, and the first is that we have not got here one entire property. It is true the property is described in different ways, and a distinction has been drawn in argument between *Camden Park* and *Camden Park* estate. But I will not dwell upon that because we have had evidence to shew that this property which was offered for sale, included in the plan to which I have just referred, was known as the *Camden Park* estate. That is sufficient for that purpose. Then we have also the *Pembury* property, and it has been argued that I cannot apply the doctrine which I am asked to apply by the Plaintiffs because I cannot say to what property it was to be referred. That would be so if I was dealing with a covenant. If I am dealing with a covenant, and actually deciding between covenantor and covenantee what was the extent of the covenant, I must spell the application of the covenant to any particular property out of the words of the covenant. But what I have to do here is to consider the intention of the parties. I am to consider what is the irresistible inference from all the facts. It is a question of fact, Mr. Justice *Wills* says more than once, an inference which you are to draw from the circumstances of the case. Mr. *Warmington* appropriately suggested that a man might be offering at the same time a property in *Yorkshire* and a property in *Sussex*, and, perhaps, under similar conditions; and of course if they were similar conditions the Court would apply by inference the *Yorkshire* conditions to the *Yorkshire* property; that is to say, so far as they were necessary, in favour of *Yorkshire* purchasers, and the conditions as regards the *Sussex* property to the *Sussex* purchasers. You would not consider that because they all might be one estate, derivable under one will or one settlement, therefore the conditions applied in favour of purchasers in *Yorkshire* to property in *Sussex*. I do not feel any difficulty in saying that these conditions which are sought to be enforced are applicable in favour of purchasers of the *Camden Park* estate as against purchasers of the *Camden Park* estate. That is to my mind the reasonable inference, and one to which the Court is necessarily drawn.

Then there is a more plausible argument to this effect—that the conditions are different as regards different lots; that there is more than one property; that some of the lots are altogether free from conditions; that some were in the first instance put up for sale subject to conditions and were afterwards sold free from conditions: not only that, but that one of the Plaintiffs actually bought a part of it free from conditions, and that it does not lie in the mouth of the Plaintiffs to say that the conditions subject to which the Defendant bought can be enforced. To my mind that makes not the slightest difference. It is true that there are different conditions, and there are different conditions applicable to different lots and different bunches of lots, if I may so say, and it is not only reasonable, but it is what one might expect. When a considerable property, going, I think, to 100 acres here, is laid out in building lots, you would expect those who have the management of the property to say, "so much shall be laid out for building houses worth £1200. On the other side of the road there shall be less valuable houses; £1000 will do for them. Further off we want a different class altogether; £600 will do for that—and perhaps it would be as well to leave a few more acres entirely free. Persons may wish to turn them to the use of other purposes than building; we will not bind them to do anything with them." In the development of a building estate judgment is required in such matters, and it certainly is against one's own common experience to find an extensive property of 100 acres laid out on the principle that only houses of a particular class shall be built all over it. Here, I think, a church is built upon one of the plots, and there is certainly a vicarage built on another. Such matters necessarily come into consideration in the development of a building property. I do not see why, because one man has a property on which he can build a house of £600, he should not be entitled to insist upon a condition that another man should build a house of £1200. I can well conceive a man buying a property of this kind for a shop, and saying: "It is very important to me that within reasonable reach of my shop door there should be large residential houses. I should never have thought of buying a piece of land on which to build a shop unless I could have been quite certain that within reasonable reach there would be residences of persons who would deal with me. That is the value of the land to me—not that I should have the land, but that there should be persons who will dwell near me and deal with me." On the other hand, the persons who have the £1200 properties may very reasonably require that there shall be smaller properties, or, on the other hand, that there shall not be properties which will depreciate the value or the amenities of those which they purchase. The Defendants' argument on this point seems to me to be made under a misapprehension, rendered necessary perhaps by the exigencies of his position, of the circumstances under which a building estate is developed.

That being so, it is suggested that there were some motives of the Plaintiffs other than those which are put forward in the pleadings, evidence, and argument. Mr. *Collins*, I think, is said not to wish to build at all upon his land, and I think Mrs. *Douglas* it is also suggested, though there is no evidence of it, did not wish to build upon her land, and therefore that they cannot be simply enforcing the covenant. I have nothing whatever to do with the motives. What I have to see is these two things. Are the Plaintiffs entitled to enforce these restrictions according to law? And I think I have also to see this: Is it important to them that they should enforce them? When a man is suing on a covenant, leaving out of the question of course those *minima* about which the law is said not to care, it is immaterial whether there is damage or not. A man is entitled to enforce that covenant, which is a species of property. In a case like this, however, it is important to prove damage, but when a man has proved the damage then, to my mind, if he has got a right to sue the right to relief follows.

Apart from any question of evidence, it seems to me obvious and incontrovertible that a man who has purchased a property knowing that within a short distance another property is put up for sale on the condition that on that other property there shall be built houses of not less value than £1200 each can allege damage if houses are built on that property of less than £1200 each; and it is immaterial whether he intends to build on his own land or not. In either case damage may exist. It may be a different sort of damage, it may be a different amount, but that there will be damage I cannot for a moment doubt. I should hold that quite apart from the evidence. But evidence was put in which the Defendant failed to controvert, and damage as the result of the Defendant's intended operations was conclusively proved. Therefore, I hold that the Plaintiffs here have established these two things. First, that they are entitled, not to sue the Defendant on the covenant contained in his purchase deed, but to enforce that covenant so far as it is in accordance with the conditions subject to which he bought, and subject to which the Plaintiffs knew that he must buy, if the vendors did their duty; and, secondly, that the damages which they will sustain if the Defendant is not restrained are sufficient to enable them to maintain an action in this Court. That being so, I think they are entitled to the injunction they ask.

Solicitors for Plaintiffs: *Sole, Turner, & Knight*, agents for *Cripps & Son, Tunbridge Wells.*

Solicitors for Defendant: *Smith, Stenning, & Croft*, agents for *Pearless & Beeching, Tunbridge Wells.*

C. M.

KEKEWICH, J.

1887

June 30.

HOBBS *v.* WAYET.

[1885 H. 2366.]

Shares—Trustee—Indemnity—Action before Call—Distringas—Disclaimer.

Certain moneys belonging to *A.* were invested in shares in a banking company in the joint names of *A.* and *B.*, the ultimate trust being for the estate of *A.*, who predeceased *B.* The company went into liquidation and calls would be made upon the shareholders, on the list of whom the executor of *B.* would be put:—

Held, that the executor of *B.* was entitled to be indemnified by the estate of *A.*, and might bring an action for and obtain a declaration of indemnity before he was on the list and before any call was made on him.

Fraser v. *Murdoch* (1) discussed.

Hughes-Hallett v. *Indian Mammoth Gold Mines Company* (2) distinguished.

By putting a *distringas* on shares a legatee does not accept the shares so that he cannot afterwards disclaim.

IN the year 1863 certain moneys belonging to *Hannah Hughes* were invested in the joint names of *Hannah Hughes* and *E. T. Roe* in the purchase of £200 *East India Railway* debenture stock and ten £25 shares in the *Oriental Bank Corporation*, under circumstances which, according to the decision of the Court, left *Hannah Hughes* entitled to the stock and shares after the death of *E. T. Roe.* She died in 1878, having by her will left the stock and shares to seven charitable societies, all of which had since the winding-up renounced all claim to the legacy. But shortly after her death a *distringas* on the stock and shares had been placed on behalf of the *British and Foreign Bible Society*, one of the charities, under the circumstances stated in the judgment.

E. T. Roe died in September, 1884, leaving *W. Hobbs* his executor.

In May, 1884, an order was made for winding up the *Oriental Bank Corporation*, and the names of *Hannah Hughes* and *E. T. Roe* were placed on the list of contributories. In April, 1885, the official liquidator informed the Plaintiff that he would be placed on the list of contributories as executor of the survivor, and that a call of £400 would be made upon him.

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(1) 6 App. Cas. 855.

(2) 22 Ch. D. 561.

W. Hobbs brought this action against *F. F. Wayet* and *R. J. Bowerman,* the personal representatives of *Hannah Hughes,* claiming to be indemnified out of her estate against all calls and liabilities in respect of the shares in the bank, and if necessary for administration of the estate of *Hannah Hughes.*

Warmington, Q.C., and *Hull,* for the Plaintiff:—

The money was Miss *Hughes's,* and the facts and documents shew clearly that Dr. *Roe's* executor was after the deaths of both a trustee for her estate. As to the legacy of stock and shares, instead of being valuable they will probably cause a liability, and Dr. *Roe's* executor is entitled to be indemnified out of the estate of Miss *Hughes: Balsh* v. *Hyham* (1); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Company* (2); *Fraser* v. *Murdoch* (3); *Jervis* v. *Wolferstan* (4).

B. B. Rogers, for the Defendants, the executors of Miss *Hughes*:—

On the facts and documents the property went to Dr. *Roe* as the survivor. But even if it is held to have been Miss *Hughes's,* this action is premature, as the estate of Dr. *Roe* is not and may not be subject to any liability. *Wooldridge* v. *Norris* (5) was a case of suretyship, which is different. As to one-seventh at all events, the *British and Foreign Bible Society,* and not the executors, are the persons liable, as they by placing a *distringas* accepted the liability.

KEKEWICH, J. (stated the circumstances as to the debentures and shares, and came to the conclusion that Miss *Hughes* was entitled to them after the death of Dr. *Roe,* and continued):—

The question, then, is whether Dr. *Roe's* estate is entitled to be indemnified? Unfortunately the *Oriental Bank* shares which were thought to be valuable have turned out to be worse than valueless. Dr. *Roe's* executor will be placed on the list of contributories, and there is a possibility of his being called on to pay some money.

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(1) 2 P. Wms. 453.

(2) 22 Ch. D. 561.

(3) 6 App. Cas. 855.

(4) Law Rep. 18 Eq. 18.

(5) Law Rep. 6 Eq. 410.

It is said, in the first place, that even if he is called upon to pay money he will not be entitled to indemnity; and, secondly, that the right to an indemnity has not yet arisen. Now, as regards the first point, I should have been prepared—indeed I should have been bound—to accept the rule as laid down by the Master of the Rolls in *Jervis* v. *Wolferstan* (1), and as I construe Lord *Blackburn's* remarks in *Fraser* v. *Murdoch* (2), I believe I am entitled, and if entitled, then bound, to accept that rule in its broadest sense. Lord *Blackburn* only comments upon it in passing and without saying more than that it is perhaps too broadly stated. But for the present purpose I can fall back on Lord *Blackburn's* statement of a rule which can be placed side by side with the other. Lord *Blackburn* says: "No doubt any one who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound at law as well as in equity, to indemnify him." There is no doubt about this, that Dr. *Roe* accepted these shares, on which there was a liability, at the request of Miss *Hughes*, because it was her money, and he could not have accepted it without her request, and the liability imposed on him is a liability imposed on him in consequence of his accepting those shares. It seems to me, therefore, that the executor of Dr. *Roe* is entitled to be indemnified by Miss *Hughes's* estate.

Then it is said that this action is brought too soon. We have some evidence upon that. We have heard that Mr. *Hobbs's* name will be settled on the list of contributories as the executor of Dr. *Roe*, and we are told that the liability will be enforced. This case may be distinguished to some extent from that of *Hughes-Hallett* v. *Indian Mammoth Gold Mines Company* (3), and that being so, I pass that case by without further remark. But to my mind it is hit exactly by the decision of Vice-Chancellor *Giffard* in *Wooldridge* v. *Norris* (4), although no doubt the passage which he quotes from Lord *Redesdale* (5) was more pointed to a surety than to a *cestui que trust*. I think that a man who accepts a liability, and who is therefore entitled to be indemnified directly the cloud appears—I am using a metaphor which I find made use of in that case—however small that cloud may be, is entitled to go to the man who made the request and say, "I am entitled to be indemnified," and if the right to indemnity is denied he has a right to come to this Court and obtain a declaration that he or his testator's estate is entitled to be relieved from that liability. Here I have that very case. The action has been commenced and the liability is denied at the Bar. What more can the Plaintiff want to justify his claiming the indemnity by action than the denial at the Bar of his right to relief?

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(1) Law Rep. 18 Eq. 18.

(2) 6 App. Cas. 855, 872.

(3) 22 Ch. D. 561.

(4) Law Rep. 6 Eq. 410.

(5) Mitf. Pl. 5th Ed. 171.

Then there is another and an extremely interesting point, and that is with respect to the *distringas*. The societies have executed disclaimers, and of course they do not want the shares, which are a *damnosa hereditas*, and they know also that the *East India Railway* stock which was settled with the shares must go to meet the liability on the shares. I hold their disclaimers to take them out of the field altogether, if they otherwise could be brought within it, about which I say nothing. An exception is attempted to be made with regard to the *British and Foreign Bible Society*. As regards that society, their solicitor knew that there was some interest under the will, and being warned that Dr. *Roe* might possibly run away with the money (I pass that by without further remark), the solicitor very properly, knowing that this trust fund was in the hands of a sole trustee, thought that the charity which he represented ought to be protected, and thereupon, either acting under a general resolution, or thinking it was right at once to do what if he had been summoned to a meeting of the governors of the charity he should have advised them to do, he put a *distringas* on the *Oriental Bank* shares. He had no express authority to do it, but I treat it as if he had, and that what he did came within his ordinary duty towards his client. Then what does that amount to? The *distringas* is put on by virtue of rules which are of quite modern date. They were first brought into the rules of the Court in their present form in 1880, and they were founded on the old *distringas*, which was merely a writ. Any person could get a

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writ of *distringas* and stop a fund as regards either principal or interest by swearing a short affidavit and taking that to the proper officer. That usually applied to funds in the *Bank of England*, but it was also applied to some other companies. The affidavit which was used in those days was simply, "I, the above-named *A. B.*, do solemnly swear that according to the best of my knowledge, information, and belief, I am beneficially interested in the stock hereinafter particularly described." When the *Judicature Act* was about to pass and the rules were being framed, this question of *distringas* came under consideration, and those who had to frame the rules found it a very serious matter, and postponed it in order to look into the practice. After a time the matter was further considered, and then ultimately there were passed several rules under Order XLVI. Instead of the affidavit and the writ there is to be an affidavit filed and a notice served on the *Bank of England* or any other company. There was no intention to give relief to a new set of people, but the object was, and is, to enable a person who thinks that there is a fund standing in the names of trustees to which he may have a claim, and to which possibly he may become entitled in some way or to some interest, to stop that while he is making the necessary inquiries, and, it may be, taking proceedings to assert his case. The essence is that he does not know whether he is entitled to it now or not. The virtue of a *distringas* is that a man may, if he hears for instance that new trustees are going to be appointed, have an opportunity of defending his rights. It does not act as an injunction, but he has to have notice if any one wishes to transfer the fund, and unless he then moves within a certain time the *distringas* is gone. If I were to hold that a man by swearing that he believed he was interested in a fund thereby accepted the fund, so that thereafter he would be estopped from denying the fact, there might be terrible consequences. You might have an affidavit and notice held to be equivalent to election, though the party on whose behalf the notice was given did not know his rights, and acting on the advice of a solicitor merely wished to have an opportunity of reflection. It certainly never entered the minds of those who framed the new rules, and I certainly shall not hold that an affidavit in which a solicitor states his belief that a client is beneficially interested in some shares in a bank, amounts to an acceptance of those shares so as to prevent a disclaimer afterwards.

I must give the Plaintiff the relief which he asks by way of indemnity. A declaration that Miss *Hughes's* estate is liable to indemnify Dr. *Roe's* in respect of the *Oriental Bank* shares formerly standing in their names will be sufficient.

Solicitor for Plaintiff: *J. Robinson.*
Solicitor for Defendants: *R. J. Bowerman.*

C. M.

C. A.

1887

STIRLING, J.

Feb. 16.

C. A.

May 18, 19, 20.

In re HILLEARY AND TAYLOR.

Practice—Taxation—Costs of Shorthand Notes of Evidence—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-r.* 25.

On a taxation of a solicitor's bill of great complexity it became necessary to examine witnesses orally before the Taxing Master, who, before the examination, stated his opinion to be that a shorthand writer ought to be employed. Neither party objected, each employed a shorthand writer, and the Taxing Master stated that he should rely on the notes. More than one-sixth having been taxed off, he allowed against the solicitor half the costs of the shorthand notes of the evidence, on the ground that the parties ought to have employed one shorthand writer. The solicitor objected to the allowance of any part of the expense of the shorthand notes:—

Held, by *Stirling*, J., that as the Taxing Master had authority under Order LXV., r. 27, sub-r. 25, to have witnesses examined before him, he had discretion to allow the expense of shorthand notes of their evidence:—

Held, on appeal, that neither a Judge nor Taxing Master has jurisdiction to order a shorthand note of evidence to be taken, but that as neither party had objected to having it taken, but had acceded to the Taxing Master's view, the allowance to the successful party of the same costs as if they had agreed on one shorthand writer ought not to be disturbed.

ON the 22nd of April, 1882, an order was made on the application of Mr. *Alfred Kirby* for the taxation of the bill of costs of his solicitors, Messrs. *Hilleary & Taylor*, and also of their bill of costs against the firm of *Holland & Co.*, of which *Kirby* had been a member. The bills as carried in amounted respectively to £4279 14*s.* 5*d.* and £2424 1*s.* 6*d.* The Taxing Master did not make his certificate till July, 1885. The bills had been taxed down to £3105 14*s.* 2*d.* and £1042 3*s.* 3*d.*; and, as more than one-sixth had been taxed off, the Taxing Master proceeded to tax *Kirby's* costs of the application to tax and the reference, which he settled at £717 7*s.* 11*d.*

Among the items in *Kirby's* bill of his costs of the application to tax and the reference were sums paid to a shorthand writer in 1884 and 1885 amounting altogether to about £45 for notes of evidence taken before the Taxing Master. The Taxing Master allowed one-half of that.

Messrs. *Hilleary & Taylor* took in numerous objections to the taxation. The objection (No. 35) to the above items was, "The solicitors object to these items on the ground that charges for a shorthand writer are not allowable as between party and party."

The Taxing Master overruled the objection, giving as his reason, "The question as to the allowance of the shorthand writer's notes is in the discretion of the Court. Messrs. *Hilleary* gave notice of attending by a shorthand writer, and Mr. *Kirby's* solicitor also engaged one. I considered that the parties should have mutually agreed upon one, and therefore only allowed as against Messrs. *Hilleary* half of the shorthand writer's charges."

It appeared that for the purpose of taxing Messrs. *Hilleary & Co's* bills it was necessary to take a considerable amount of *vivâ voce* evidence before the Taxing Master. Before the commencement of the examination the Taxing Master expressed his opinion that it was desirable to employ a shorthand writer to take notes of the evidence. Neither party objected that such a course was unnecessary. Messrs. *Hilleary & Co.* had shorthand notes taken by a clerk of their own, and Mr. *Kirby* employed a professional shorthand writer. The Taxing Master stated to the parties that he should rely on the shorthand notes, and he did not himself take any notes of the evidence.

Messrs. *Hilleary & Taylor* took out a summons to vary the Taxing Master's certificate in various particulars, including the allowance of a moiety of the shorthand writer's charges. The present report is confined to this item.

The summons was heard before Mr. Justice *Stirling* on the 16th of February, 1887.

W. Pearson, Q.C., and *Normandy*, for Messrs. *Hilleary & Taylor*:—

The Taxing Master ought not to have allowed as against our clients any part of the costs of these shorthand notes.

It was his duty himself to take notes of the evidence given before him upon each of the objections.

In a case of taxation between party and party the costs of shorthand notes are never allowed; the one exception to this rule being in the case of an appeal, where the cost of the shorthand writer's note of the judgment of the Court below is allowed

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in order to enable the Court of Appeal to see what were the grounds of the decision appealed from.

It is true that a Judge may in his discretion give a special direction that shorthand notes of the evidence and proceedings shall be taken and used, and the costs of them allowed.

But no such direction was given by the Judge, and the Taxing Master had himself no power to give such directions. He is not a Judge in this sense. He is simply an officer of the Court, taxing the bills under the direction of the Court, with power for the purpose of the taxation, and subject to review, to come to a conclusion on certain questions of fact; and he must take the evidence as an officer of the Court, and without any of the powers which the Court itself would have over the proceedings.

Hastings, Q.C., and *Maidlow*, for Mr. *Kirby* :—

We admit that the modern practice is not to allow the costs of shorthand notes of the evidence and daily proceedings upon taxation between party and party; but a Judge can in the exercise of his discretion direct the allowance of such costs, and in a proper case will do so: *London Financial Association* v. *Kelk* (1).

The only question is whether the Taxing Master has such discretion. And we submit that as a matter of principle this discretion is not limited to the Judges sitting in the Royal Courts of Justice, but is involved in the position of a Judge wherever sitting, and may be exercised by a Taxing Master when sitting as a Judge to hear a taxation. Moreover, this discretion is vested in the Taxing Master under the Rules of the Supreme Court, 1883, Order LXV., rule 27, sub-rules 25 and 38.

The Taxing Master considered that these notes were material for the purposes of the case before him, and in the exercise of his discretion has allowed one half of the costs of them, and this Court will not interfere with his order.

W. Pearson, in reply.

STIRLING, J. :—

As to objection 35, with reference to the shorthand notes taken before the Taxing Master, I have had an opportunity of seeing

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(1) 26 Ch. D. 107, 154.

Master *Spofforth* on the subject, and I have ascertained from him that in point of fact he stated to the parties before the commencement of the examination of the witnesses that he intended to rely on the shorthand notes of the evidence. He also tells me that he has looked into the shorthand notes, and that with the exception of the incidental discussions which arise in the course of every trial, and as to which it has been very difficult to sever the parts, he considers that the shorthand notes relate exclusively to the evidence. It is on the footing of that information that I deal with the matter.

The sole question then is this; an order was made by Vice-Chancellor *Hall* in the year 1882 directing certain bills to be taxed. They are taxed accordingly, and in the course of the taxation various questions arise which call for the determination of the Taxing Master upon evidence. He has by the practice of the Court, and under Order LXV., rule 27, sub-rule 25, full power to cause witnesses to be examined before him, and witnesses were called and examined before him accordingly. Then, in addition to the order for taxation, it is directed by the reference that if the "bill or bills when taxed be less by a sixth part than the said bill or bills so delivered, the said Master do tax the applicant his costs of these applications and of the adjournment thereof into Court." Now he has proceeded upon that to tax the costs of the taxation itself, and in taxing these costs, he, in the exercise of his discretion, has seen fit to allow a certain part of the shorthand writer's notes of the evidence which was taken before him. Of course if he were taxing in the ordinary way as between party and party the costs of an action, and the Judge at the trial had given no direction as to the allowance of the shorthand writer's notes of the evidence, that would have been a matter entirely beyond his discretion; he would have had no power to deal with it at all, and the allowance of these shorthand writer's notes would be entirely erroneous. But that is not, I conceive, the point in this case. The question here is this: the Taxing Master being in a sense the Judge, the person to whom the duty of considering the questions arising on the taxation is entrusted by the Court and who is required to decide them, has he or has he not the same discretion as to the allowance of shorthand

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writer's notes as a Judge in Court trying an action with witnesses would have? Now it seems to me most important that the discretion of the Judge in that respect should not be fettered. It is no doubt, as a rule, the duty of a Judge in Court to take notes of the evidence, and so it is the duty of the Taxing Master to take notes of the evidence before him. But at the same time cases arise in which, certainly as regards a Judge in Court, that duty may be superseded by one much more imperative, that is to say, the duty to watch closely the witnesses (I take that as an example) and to attend to their demeanour, a duty which would be much interfered with if he were to take constant and continuous notes. In such a case as that it would, as I conceive, be right for the Judge in Court, at critical parts of the examination, to cease to take notes himself and to direct that shorthand notes should be taken, and to allow those costs as between party and party at the conclusion of the trial. That is one case in which it would, as I conceive, not merely be right and proper for a Judge presiding at a trial, but it would almost be the duty of such Judge to exercise a discretion in favour of the allowance of shorthand notes. Then that being so as regards a Judge in Court, why is the Taxing Master, on whom devolves from the Court the duty of taking the evidence and deciding on the questions of fact which arise in the course of the taxation, to have less discretion? I confess I do not see it. It seems to me that there is nothing in the rules or in the practice of the Court which lays down that the Taxing Master, when dealing with evidence properly taken before him in the course of the taxation, shall not have the same discretion as to the mode in which the evidence is to be taken as a Judge would have if the case were tried in Court. Taking this view of the position of the Taxing Master, and having ascertained from him that he exercised his discretion both as to the propriety of the notes being taken, and as to the propriety of the allowance which he has made in reference to those notes, I consider that I am bound to overrule the objection, and I accordingly do so.

W. W. K.

C. A.

The solicitors appealed on various points, including that as to the shorthand notes, and the appeal was heard on the 18th, 19th, and 20th of May, 1887.

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Maclean, Q.C., and *Normandy*, for the appeal.

Hastings, Q.C., and *Maidlow*, for the Respondent, in addition to the case cited below, referred to *Re London, Birmingham, and Buckinghamshire Railway Company* (1) and *Clark* v. *Malpas* (2).

COTTON, L.J. (after dealing with various objections to the taxation as to other items, proceeded as follows):—

As to the costs of employing a shorthand writer to take notes of the evidence before the Taxing Master, and the expense of a transcript of his notes. This Court has considered it desirable to prevent unnecessary expense in taking shorthand notes, and therefore refuses to allow the costs of them other than shorthand notes of the judgment of the Judge whose decision is under appeal, except in special cases. In the present case, however, I think that the decision of the Taxing Master ought to be sustained, though not precisely on the grounds taken by Mr. Justice *Stirling*. I do not think that a Judge has jurisdiction to order adversely that a shorthand writer shall be employed. It is part of the duty of the Judge and of the counsel to take notes of the evidence, and I think it would be wrong to hold that either a Taxing Master, or a Chief Clerk, or a Judge can order shorthand notes of it to be taken. But here the Taxing Master stated his opinion that the best course would be to have a shorthand note taken, and both parties acquiesced in this view. If they or either of them had objected, and said that they did not wish to be burdened with this additional expense, the matter would have stood very differently. But he made this suggestion, both parties acceded to it and went on upon that footing. Each party took shorthand notes and the Taxing Master relying on this arrangement did not himself take notes. In taxation he has allowed the successful party half the expense of the notes. The reasonable thing for the parties to have done would have been to agree on a shorthand writer and share the expense. They

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(1) 6 W. R. 141.

(2) 31 Beav. 554.

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did not come to any agreement, and I do not think the Taxing Master wrong in allowing the successful party half the expense of the shorthand notes which were taken for him, thus placing him in the position in which he would have been if the parties had come to a reasonable arrangement.

LINDLEY, L.J.:—

I am of the same opinion as to the shorthand notes of evidence.

BOWEN, L.J.:—

I am of the same opinion on that point, and am anxious to express my assent to the remarks of the Lord Justice *Cotton*. I do not think that it would in general be reasonable to have shorthand notes of the evidence before the Taxing Master taken, nor do I think that he had jurisdiction to order it to be done. But in the present case there are special circumstances. The Taxing Master, rightly or wrongly (whether rightly I have great doubt), was of opinion that it was desirable that shorthand notes should be taken. The parties took no objection, though they might have done so, but assented to the suggestion. Messrs. *Hilleary & Co.* took the initiative by stating that they should appoint a shorthand writer. They appointed a clerk of their own, and it was not very likely that the other side should assent to his being employed to take a shorthand note on behalf of both, so they had a shorthand writer of their own. The parties ought to have agreed upon one shorthand writer, but the action of Messrs. *Hilleary & Taylor* led the other side to employ a separate shorthand writer. The two notes differ a good deal, which shews that Mr. *Metcalfe* was not unreasonable in choosing to have a shorthand writer of his own.

Solicitor for Appellants: *R. J. Gooch.*
Solicitor for *Kirby*: *R. Metcalfe.*

H. C. J.

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June 10, 11, 13.

[1883 B. 2623.]

Foreign Law—Tenant in Tail—Waste—Liability under implied Contract—Tort—Actio personalis moritur cum personâ.

The possessor of Austrian entailed estates died domiciled in, and left property in, *England*. By the law of *Austria* the possessor is under an obligation to hand over the property to the successor in as good a state as when he received it, and is liable for deterioration, whether voluntary or permissive, unless it occurs without any fault of his, and he is entitled to compensation for improvements made by him. The successor brought a creditor's action in *England* against the English executrix, in which it was admitted by the parties that there was some deterioration, and also that some improvements had been made. *North*, J., made a decree for administration with liberty to the Plaintiff to take proceedings, in the Courts of the countries in which the estates were situate, to establish the amount of his claim:—

Held (affirming the decision of *North*, J.), that the objection that the Plaintiff's claim was for a tort analogous to waste, and therefore, according to English law, died with the person, and could not be enforced in an English Court, was not sustainable, for that the deteriorations were not to be regarded as torts but as breaches of an obligation in the nature of an implied contract.

But, *held*, that the accounts in an administration suit ought not to be directed till it was ascertained that a sum was due to the Plaintiff.

THIS was an action by Prince *Edmund Batthyany Strattman*, on behalf of himself and the other creditors of Prince *Batthyany Strattman*, deceased, for the administration of the English real and personal estate of the late Prince, the Defendants being the trustees and the executrix of his will, which had been proved in *England*.

The late Prince had been in possession of estates in *Austria* and *Hungary*, which were the subject of *fidei commisse*, analogous in their nature to entails. On his death the Plaintiff succeeded to those estates. The case made by the statement of claim was that the estate of the late Prince was indebted to the Plaintiff in respect of a proportional part of the rents of the settled estates which had been paid in advance, and was also indebted in a large

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sum in respect of deterioration (analogous to waste or dilapidations) caused and permitted by the testator during his tenancy (1).

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(1) The Austrian Civil Code, a translation of which was produced, contained the following provisions, which were referred to by the expert witnesses and in argument as bearing on the questions raised:—

"359. . . . If one person has only a right to the substance of a thing, the other, on the contrary, in addition to a right to the substance, the exclusive right to the produce of it, the right of property is then divided and incomplete for both parties. The former is called lord paramount, the latter usufructuary proprietor.

"509. A usufruct is the right of enjoying without any restriction a thing belonging to another, supposing the enjoyment does not injure the substance.

"511. The usufructuary has a right to the full produce both ordinary and extraordinary, therefore the clear gain of the shares of a mine obtained without infringing the existing laws for mining, and wood felled according to the forest regulations, belong to him.

"512. Only that can be considered as a clear profit which remains after deducting the necessary expenses. The usufructuary, therefore, takes upon himself all the burdens which were connected with the thing under easement at the time the usufruct was granted. . . .

"513. The usufructuary is bound to keep the property under easement like a good tenant in the state in which he has received it, and to provide for the repairs, redintegrations, and restorations from the produce. If notwithstanding the value of the thing under easement is diminished merely by the legal enjoyment without any fault of the usufructuary, he is not answerable for it.

"514. If the proprietor carries out at his own expense in consequence of notice given to him by the usufructuary, constructions which have become necessary . . . the usufructuary is bound to compensate him the interest of the capital employed in proportion to the usufruct improved by it.

"515. If the proprietor cannot or will not agree to it, the usufructuary is justified either in carrying out the construction and demanding like a *bonâ fide* possessor compensation after the expiration of the usufruct, or in demanding a suitable compensation for the usufruct which has been lost in consequence of the construction not having been carried out.

"518. In order to facilitate the proof of the mutual demands, the proprietor and the usufructuary are bound to have an authenticated description drawn up of all the things subject to easement. If this has been omitted it is assumed that the usufructuary has received the property with all the necessary requisites for the ordinary use of it in a serviceable state of middle quality.

"618. An entailment is a disposition by virtue of which property is declared as an inalienable estate for all future members, or at least for several members of a lineage.

"627. No entailment can be established without the consent of the legislative power. When its erection takes place a proper certified inventory of all the articles belonging to the entailment is to be drawn up and placed in judicial custody. This inventory serves as a direction in every change in the possession and in the separation of the entailment from the free property. . . .

Nearly the whole of the Austrian property was subject to leases granted by the late Prince for terms of years, which at the time of his death had some years to run. The leases had been duly approved by the Court, and did not determine on his death. The lessees had paid large sums as caution money, which it was alleged by the Plaintiff ought to have been in Court in *Austria* as part of the funds of the *fidei commisse*, but were not found there.

Evidence was given at great length by Austrian lawyers on both sides as to the law of *Austria* relating to deteriorations. One witness for the Defendants, being asked whether the action by the possessor against the heirs of the preceding possessor was an action founded on contract or tort, replied, "It is not an action founded upon contract. There is no contract existing on which it could be founded. It is an action founded upon tort, if you

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"629. The right of property in the fortune under entailment is divided between all expectants and the possessor of the entailment for the time being. The former have the right of lord paramount alone, but the latter also the usufructuary property.

"631. The possessor of the entailment has all the rights and obligations of a usufructuary proprietor. The whole of the profits of the estate under entailment and of the increment thereof, but not the substance, belongs to him. He is not answerable for a diminution of the substance which has occurred without any fault on his part.

"633. The possessor of the entailment can, under the restriction afterwards given, change the immoveable estate under entailment into capital, he can exchange parcels of lands for other parcels of land, or lease them out for a suitable rent. . . .

"634. For these alterations he requires the approbation of the ordinary Court. . . .

"640. The successor in the entailment is only bound to pay the debts of his predecessor contracted with judicial consent. He is only answerable for the repayments which have fallen due to discharge as far as they cannot be effected from the free inheritable property of the predecessor.

"641. If the predecessor has incurred considerable expense for preserving the entailment or for important improvements in regard to it . . . the expense must be replaced."

By an Imperial decree of the 9th of August, 1854, it was provided that: "After the death of any proprietor of an entail a fresh inventory is to be made in which, first of all, the entailed estate is to be described in the condition in which it has been left, and then it has to be shewn whether the entailed estate has to pay to, or claim an indemnification from, the heirs of the free estate, for an increase or a diminution of the property set forth in the principal inventory, and this is to be stated as a debt or claim of the entail."

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understand by tort what the Romans understood by the word *delictum*." He was further of opinion that if the lessees were substantial persons at the death of the preceding possessor, his heirs were not liable for any deteriorations which the lessees were bound to make good. Similar evidence was given by other witnesses for the Defendants. They all stated, and this was not disputed, that the heirs of a deceased possessor were not liable for deteriorations which had occurred in his time without any "*culpa*" on his part, and it was agreed that "*culpa*" included omission as well as commission. The witnesses for the Plaintiff stated that according to Austrian law the possession of a *fidei commiss* estate was under an obligation to maintain the property in the state in which he received it, and not to allow it to fall into decay for want of repair, and that if he failed to do this during his lifetime, his unentailed estate was liable to make good the deteriorations, unless his heirs could prove that the deteriorations took place without any "*culpa*" on his part. They also gave their opinion that the existence of the leases would not exonerate the heirs.

The law of *Hungary* was shewn to be substantially the same as that of *Austria* on the question of deteriorations.

In August, 1884, an order was made for the delivery by the Plaintiff of particulars of the alleged deteriorations. The Plaintiff accordingly delivered particulars, including in them the caution money. On the 18th of July, 1885, an order was made on motion, for which, by consent, an order of the 8th of April, 1886, was substituted, by which Mrs. *Smith*, the executrix, admitting that the late Prince had been till his death entitled to possession of the lands in the *fidei commisse*, and that on his death the Plaintiff became entitled to possession of them, and that the late Prince received the rent of part of the lands in advance, and admitting (for the purposes only of the trial of the issues thereinafter directed, and of founding any inquiries the Court might direct consequent on the decision of the issues) that there were deteriorations of and loss to the lands caused or permitted by the late Prince of the nature alleged by the Plaintiff, and the Plaintiff admitting for the above purposes only that some parts of the lands were subject to leases approved by the proper Courts which had not expired, and that there were some improvements effected by the testator, it was directed that four issues should be tried:—(1) whether the executrix was liable in respect of any of the claims in respect of which the action was brought; (2) whether and how far such liability (if any) in respect of rents was limited or affected by payments (if any) made by the late Prince in respect of a period subsequent to his death, and whether the Plaintiff ought to bring into account rents accrued in respect of a period prior to the testator's death, which had been received by the Plaintiff, or for the purpose of receiving or impounding which he had taken proceedings in *Austria* or *Hungary*, and whether in taking such account (if any) against the Plaintiff he was entitled to be credited with payments made by him in respect of the period prior to the testator's death; (3) whether and how far such liability was limited or affected by reason of the leases; (4) whether Mrs. *Smith* as executrix was, and to what extent, entitled to a deduction or set-off in respect of improvements made by the testator.

Mr. Justice *North*, before whom the action came on for trial, held that the Plaintiff was entitled to claim as a creditor for what should be found due for deterioration, but that the amount of his claims must be reduced by what should be found due to the testator for improvements, the amounts to be ascertained in the Courts of the country where the estates were, and that the claim for deterioration was not a claim in respect of a tort, but for a breach of an obligation of a contractual nature, and therefore did not come within the rule *actio personalis moritur cum personâ* (1).

The judgment was to the following effect:—

Order the following accounts and inquiries; 1. An account of what is due to the Plaintiff as a creditor of the testator in respect of matters not covered by account 7, and inquiry 8; 2. An account of the testator's funeral expenses; 3. An account of his personal estate come to the hands of the executrix or any person for her use; 4. Inquiry as to outstanding personalty. Usual direction to apply personal estate in payment of debts in a due course of administration. If personalty insufficient then, 5. Inquiry as to real estate of the testator; 6. Inquiry as to incum-

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(1) 33 Ch. D. 624.

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brances; 7. An account of what was due from the Defendant to the Plaintiff, or from the Plaintiff to the Defendant, in respect of the apportionment of the rents of the estates in *Hungary*, *Austria*, and *Croatia*; 8. An inquiry whether any and what sum was due from the Defendant in respect of caution money received by the testator from the general lessees in *Austria*; 9. An inquiry what was due to the creditors of the testator other than the Plaintiff. Liberty to the Plaintiff to take such proceedings as he might be advised in the Courts of *Austria* and *Hungary* for the purpose of establishing the amount of his claims against the estate of the testator for deteriorations in respect of the estates comprised in the several *fidei commisse*. Declare the Defendant entitled to set off against the deteriorations any sums due to the testator's estate for ameliorations in respect of the same lands; 10. An account of the legacies and annuities given by the testator's will. All further proceedings to be taken before Mr Justice *North*. Adjourn further consideration and costs with liberty to apply. Costs of a certain application of the 4th of February, 1884, to be costs in the action.

The Defendant *Annie Smith* appealed against this judgment so far as it adjudged that the accounts and inquiries 1, 2, 3, 4, 5, 6, 9 and 10 should be taken, and so far as it directed the testator's personal estate to be applied in a due course of administration, and so far as it ordered that the Plaintiff should be at liberty to take proceedings in the Courts of *Austria* and *Hungary* for the purpose of establishing the amount of his claims for deterioration, and that the action might be dismissed with costs as regarded the claim for deteriorations. The appeal was heard on the 10th and 11th of June, 1887.

Hemming, Q.C., and *Hadley*, for the Appellant:—

The Plaintiff has not proved himself a creditor, and therefore cannot have a decree for administration. There is an account to be taken, but it is one that cannot be taken here, it can only be taken in *Austria* and *Hungary*. The Plaintiff ought to proceed there, and if he can establish a debt there then he may come here to sue upon it. An administration order cannot be made at the suit of a creditor unless he proves a debt to be due to him, and the action so far as it asks administration ought to be dismissed. At all events so much of it ought to be dismissed as relates to waste by the tenants, which as regards the tenant in tail can only be permissive waste. Now according to English law there is no claim for permissive waste, and an action will not lie here for anything done abroad unless there is an actionable wrong according to the law of both countries: *Phillips* v. *Eyre* (1). In *England* there is no remedy for injury done by a deceased person to real estate, except to the limited extent authorized by statute 3 & 4 Will. 4, c. 42, s. 2, and that does not apply to permissive waste. The acts complained of here are torts, and the right of action can only survive where there is contract. The evidence that the claim in *Austria* is for tort is clear. There was no cross-examination upon it and no contradiction. There is according to the evidence of the Austrian lawyers no liability for damages to leased land unless there be *culpa*, and even then there is no remedy till the end of the lease; not one of them can remember a case where damages were given during the lease. The claim being of such a nature as not to be maintainable in *England* against personal representatives, the Plaintiff, however he may succeed in *Austria*, cannot establish his position as a creditor here.

Warmington, Q.C., and *Buckley*, appeared for the trustees of the real estate.

Barber, Q.C., *Ingle Joyce*, and *G. T. Millar*, for the Plaintiff, were not called upon.

1887. June 13. COTTON, L.J.:—

This was an appeal by the Defendant, Mrs. *Smith*, from the judgment of Mr. Justice *North* in this action, which is an action brought by the present Prince *Batthyany* against the trustees under the will of the late Prince, and Mrs. *Smith* his personal representative.

The Plaintiff claimed as creditor, and the judgment directed accounts and inquiries in order to ascertain what, if anything, was due to the Plaintiff, and then gave the ordinary directions in a creditor's decree for the administration of the estate.

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(1) Law Rep. 6 Q. B. 1, 28.

I will deal first with an objection upon which Mr. *Hemming* laid great stress. He urged that although the Defendant is the legal personal representative duly constituted by the Probate Court of *England*, yet no decree ought to be made because the Judge who made it held that on one point (what that was I shall have to consider presently), he could not come to any decision, and it was necessary for proceedings to be taken in *Austria* or in *Hungary*, or in both, in order to decide what (if anything) was the amount to which the Plaintiff was entitled. It was said by Mr. *Hemming* that if those proceedings were necessary in order to decide any question on which the claim of the Plaintiff to be a creditor depended, the consequence must be that the action ought to be dismissed. He conceded that an inquiry was necessary with reference to the amount which was due in respect of rents paid in advance to the late Prince, but that he said was a mere trifle. But putting aside that question, his contention was in my opinion wrong. The position of the Defendant is that of a person who has undertaken the duty of executrix under the order of the Probate Court, who is resident here, and is not liable to be sued in *Austria* or *Hungary* unless she chooses to appear and defend there. In my opinion it is no answer in such a case to say that the claim of the Plaintiff cannot be established finally (because that is all Mr. Justice *North* decided) without proceedings abroad. She has undertaken the position of executrix, and as such it is her duty to pay the debts of the testator, and if it is necessary that in order to ascertain those debts proceedings should be taken in *Austria*, or anywhere else out of the English jurisdiction, that is her misfortune, but it is no reason why she should not pay the testator's debts. In my opinion, therefore, that part of the case entirely fails.

Then it was urged that the Plaintiff has not established that he is a creditor for any sum, and that therefore it was wrong to decree the ordinary administration accounts and inquiries. Mr. *Hemming* went on to say that the consequence must be that so much of the action as sought administration must be dismissed. The first part of his contention I think in strictness was right, the second part is in my opinion wrong. If it had been urged before the Judge that the ordinary administration accounts and inquiries ought not to have been directed till the Plaintiff had established a debt, he probably would have made such a decree as we shall make, that is to say, to direct such proceedings as are necessary to ascertain whether any debt is due to the Plaintiff, and to make the administration inquiries and accounts dependent on the finding that something is due to the Plaintiff, and on this, whether the Defendant when the amount is ascertained admits assets and will pay without any accounts.

As regards the account of what was due in respect of the apportionment of rents, this account, though not in terms directed by consent, was substantially by consent, for it was admitted by both parties that it ought to be taken. Mr. *Hemming* said that it was a mere trifle, and that Mrs. *Smith* would undertake to pay what should be found due, or would admit assets to satisfy it. Now an admission of assets in that form would not be regular, but if that was the only question we should have to consider what ought to be done. But there is another matter which was said by Mr. *Hemming* to be the great matter, and it is certainly important in amount, and unfortunately it may lead to a considerable amount of litigation.

The Plaintiff, the present Prince, is in possession of estates in *Hungary* and in *Austria* which are subject to what in English law we should call a settlement, but which according to the Hungarian and Austrian law are the subjects of a *fidei commiss*, under which the late Prince was in possession down to the time of his death. The Plaintiff says to the Appellant: "There were considerable deteriorations during the time the late Prince was in possession of those estates, and by the laws of *Austria* and *Hungary* his representatives are liable to me for that deterioration. I have not yet ascertained and established the amount, but although there must be an inquiry in *Austria* or *Hungary* for that purpose, yet I am entitled to claim against you in the English Courts as a creditor in respect of that deterioration."

The Plaintiff was required to give particulars, and undoubtedly he gave particulars in the way in which in *England* particulars would be given of alleged acts of waste. The Defendant there-

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fore said: "Whatever may be the right of the Plaintiff in *Austria* or *Hungary*, he has no right to prosecute in the Courts of *England* any claim against a personal representative in respect of these matters, such claim being barred by the well known rule *actio personalis moritur cum personâ*." That is a matter to be considered, because if the account is so framed as to enable the Plaintiff to bring in a claim which could not by English law be properly advanced in an English Court, we ought, of course, if we can do so, to limit the inquiries so that they can include only those claims which according to English law can properly be made against a personal representative.

Now is this objection valid? It appears, as far as I understand the evidence, that the law of *Austria* (I will omit *Hungary* because the Hungarian law on this head is practically the same as that of *Austria*) is this: The tenant in possession under a *fidei commiss* both of real and personal estate, is considered in possession in a different way from that in which a tenant for life or a tenant in tail in *England* stands. There are no trustees, and if he loses any portion of the personal estate, which apparently stands as regards the provisions of the *fidei commiss* nearly in the same position as real estate, he must make that loss good. As regards the real estate he is answerable, at the time when he surrenders by death or otherwise the possession of the property in the *fidei commiss*, for the deterioration of the estate which has taken place since the time when he took possession. He is considered as having possession of the estate not only for his own benefit, but subject also to an obligation to hand it over to his successor in as good a condition as when he took possession, subject only to this, that he can excuse himself if he shews that the deterioration took place without any fault ("*culpa*" as it is called) on his part. But, as I understand the evidence, the claim according to the law of *Austria* is not in the nature of damages for default, but a claim under an obligation to keep the property in as good condition as the late possessor found it, with liberty to excuse himself from making good the deficiency if he can shew that it was not caused by any default of his own. That, in my opinion, is not a claim simply depending on tort, and does not come within the rule of *actio personalis moritur cum personâ*. It may be that it is a wrong which has produced the deterioration, but the claim, in my opinion, is one depending on the implied contract or obligation which, by the law of *Austria*, every possessor under a *fidei commiss* takes upon himself when he enters into possession.

It was contended that there could be no such liability of a personal representative for anything connected with default unless there was an express contract. No authority was referred to in support of that proposition, and in my opinion it is contrary to English law. We had to consider this subject in *Phillips* v. *Homfray* (1), where minerals had been dug from a neighbour's property, and there Lord Justice *Bowen* gave a very carefully considered judgment expressing his own and my views as regards this particular point. What he says is this (2): "As regards all actions essentially based on tort, the principle" (*i.e.*, *actio personalis moritur cum personâ*) "was inflexibly applied. There was, however, a species of personal actions to which the rule in question was not extended. These were such as were founded upon some obligation, contract, debt, covenant, or other duty to be performed. If an injury has been done to the personal property of the plaintiff, for relief arising out of which assumpsit could be brought (as in the case of actions against carriers and bailees), the executors of the deceased might still be sued." That, in my opinion, correctly lays down the law. It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained; but if the position of the parties was such that the law of *England* would imply a contract from that position, then on assumpsit the executor might still be held liable. There are many cases where an action can be brought upon an obligation implied by law in consequence of the position which the parties have undertaken one to another. For instance, suppose a man has contracted to buy shares, but leaves them in the name of the seller, what is the position? The seller having the shares in his name is liable to calls, the other is really entitled to the shares, and there is an implied obligation from the position of the parties that the buyer should indemnify the seller from all liability in respect of them. The case of a claim for dilapidations against

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(1) 24 Ch. D. 439.

(2) 24 Ch. D. 456.

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the executor of a late rector or vicar is very similar to the present, there is an implied obligation from the position of the rector or vicar which renders not only himself but his personal representative after his death liable to be sued for dilapidations. Take the case of *Sollers* v. *Lawrence* (1). There it is said (2): "As to the second" (*i.e.*, the second point) "that the action will not lie against the executors though there might be a remedy against *Riley*, it is contrary to all the rules laid down concerning dilapidations and the constant practice in relation to suits of this sort; for both in the Ecclesiastical and temporal Courts since these suits have been retained here, multitudes of suits, nay most of them, have been against the executors or administrators, and have been always holden to be good, because it is not considered as a tort in the testator, but as a duty which he ought to have performed, and therefore his representatives, so far as he left assets, shall be equally liable as himself." That is an example clearly negativing the idea that an express contract is necessary in order to allow such an action as against the personal representative.

In *Morgan* v. *Ravey* (3) an action was brought against the personal representative of an innkeeper for loss of goods. The declaration alleged that the innkeeper undertook when he received the goods of the plaintiff, safely to keep them, and on that undertaking (which was an implied one only), the action was brought. A verdict having been found for the plaintiff, a new trial was applied for on the ground of misdirection, the contention for the defendant being that it was an *actio personalis* and could not be maintained against the executors. Chief Baron *Pollock* (4) says: "We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him. We cannot distinguish this case from the case of a carrier. If so, the objection that such an action would not lie against executors because it is for a tort does not arise." Lord Justice *Bowen* has put into my hands the

(1) Willes, 413.
(2) Ibid. 421.
(3) 6 H. & N. 265.
(4) Ibid. 276.

case of *Wheatley* v. *Lane* (1), where, in a note by Serjeant *Williams*, it is said: "This rule" (that is *actio personalis moritur cum personâ*) "was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed; for there the action survived."

Now we know according to the Austrian and Hungarian law, and, so far as we can look at it for the purpose of informing ourselves, from that code which was handed to us, that the person in possession under the *fidei commiss* stands in a particular position to his successor, who is looked upon as lord paramount. The moment he takes possession under the *fidei commiss* he contracts, by putting himself into that position, the obligation which the law of *Austria*, although not the law of *England*, implies, that he shall hand over the property to his predecessor in as good a state as it was when he received it, and the passages in the code point to that. Mr. *Hemming* referred us to sect. 631, in order to shew (as I suppose), that the origin of the Plaintiff's claim was in tort: "The possessor of the entailment" (that is the person in possession under the *fidei commiss*), "has all the rights and obligations of a usufructuary proprietor. The whole of the profits of the estate under entailment and of the increment thereof, but not the substance, belongs to him." On the other hand, he has to bear all the charges. "He is not answerable for a diminution of the substance which has occurred without any fault on his part." That appears to me to point at what in my opinion from the evidence is the law of *Austria* and *Hungary*, that the person in possession is liable for the diminution of the substance as a breach of the implied obligation which he has taken upon himself when he enters into possession, and therefore in my opinion it cannot be said that this is an action simply depending on tort, which would die with the person. It is true that some of the witnesses, and especially those on behalf of the Defendant, say there is no liability without *culpa*, and it is urged therefore that the liability depends on tort. In my opinion, this evidence does not shew that the action is founded on tort, but merely that if it can be shewn that the deterioration for which the possessor is *primâ facie* liable has occurred without his default, then the law allows

(1) Wm. Saund. 216 a, p. 240 in ed. of 1871.

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him to be excused. There is one thing that is remarkable. We heard that according to Austrian law (whether followed strictly in all cases is another matter) an inventory is taken when the person takes possession, an inventory is taken again when he gives up possession by death or otherwise, and one of the witnesses said that the inventory is taken to shew that the *fidei commiss* is handed over as received. That points to, and, I believe, exemplifies practically, how it is that the heirs of the late possessor are liable, not merely with reference to his individual acts, which we should call acts of waste, but for the deterioration in value, leaving to him the power of shewing that the deterioration, although it exists, is not attributable to any fault of his own.

That being so, in my opinion the objection to allowing the inquiry in such a way as to enable the Plaintiff to go in and make a claim in respect of the deterioration of the estates, on the ground that such claim is not one which would according to the law of *England* be possible, cannot be sustained.

Then there is another matter with which we must deal. Undoubtedly the learned Judge said that there was one point which he could not decide; but I do not understand him as having abstained from deciding the point with which I have dealt, namely, that a possessor under a *fidei commiss* is liable for deterioration under an implied obligation, and not on the ground of tort, for he clearly lays that down in his judgment, though unfortunately the learned Judge did not put into the decree any declaration of his opinion on this point. But there was a point, and, I believe, one of great importance, which he said was one that he could not decide, viz., what is the effect of the estate being, at the time of the death of the possessor, under a lease which does not come to an end at the time of his death, but is still binding? According to the law of *Austria* any one in possession under the *fidei commiss* can only grant a lease for his own life, subject to this, that if he gets the approbation of the Court the lease will not come to an end at his death, but will continue until the term of years for which it is granted expires, and that, as I understand, is the case with regard to a considerable portion of the estate in the present case. There was some very conflicting evidence as to the effect of the existence of the leases on the liability of the deceased possessor. There has been no appeal by the Plaintiff here as against the view of Mr. Justice *North* that he could not on the evidence decide that point, and that it ought to be investigated in *Austria*. But undoubtedly there was a *primâ facie* case on the part of the Plaintiff, more than sufficient to entitle him, if the evidence on this question of fact (as it is to us) was not sufficient, to have an opportunity of establishing his case if he could by further inquiry, and in my opinion it would be very wrong to hold that because the Plaintiff had not entirely made out his case so as to enable the Court to determine all the points arising in it, we ought on that ground to dismiss the action. It would, in my opinion, be wrong not to allow the due prosecution in any way which may be deemed advisable of the inquiries necessary to ascertain the liability of the late Prince's estate. The Plaintiff must not suppose that I in any way encourage litigation spun out to an unnecessary length, but he is entitled, in my opinion, acting reasonably and within reasonable limits, to prosecute his claim so as to establish what is due, and to get payment of that from the English representative, who, although she has now appeared in *Austria* and *Hungary*, could not have been forced to do so, and who under the probate has taken a large amount of English assets.

I will only add that in my opinion it is unreasonable to contend, as was done here, and, I suppose, in the Court below, that the action ought to be dismissed in reference to the claims in respect of deterioration, on the ground that the Plaintiff had not proved anything to be due to him, after the order originally made in July, 1885, and afterwards modified on the 8th of April, 1886, had been made between the parties, which, in my opinion, conceded that there had been some deterioration of the estate, and conceded it in a way such as to enable the Court to decide what has been decided on the evidence as regards the nature of this claim, and also to direct such inquiries as might be necessary in order to work out fully the rights of the parties without burthening the Plaintiff, and the Defendant too, with the necessity of entering into such evidence of facts as, according to the contention here, ought to have been brought before the Court to enable

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the Court to retain this action, and to give a right to the Plaintiff as against the estates of the deceased.

Now the decree which will be made will direct such inquiries as will enable the Plaintiff to work out his claim, omitting for the present all those accounts and inquiries which are mere administration, and will express our opinion that in taking the accounts the Plaintiff will be entitled to such sum as he may obtain by the decision of the Courts of *Austria* and *Hungary*, or as he may otherwise prove himself to be entitled to (because the Defendants may after our decree probably shorten matters) in respect of the deterioration of the estates subject to the *fidei commiss*, and when those inquiries are worked out of course the Defendant will see whether she can admit assets. And we will also add this to prevent any difficulty being occasioned to either party, that the Defendant be at liberty to apply, if she be so advised, to ascertain what debts there are other than the claim of the Plaintiff, and for leave to pay those debts and also to pay any of the legacies which may be given by the will. I give no opinion at all, it is impossible to do so, as to whether any such leave to pay should be given to her. That, of course, must depend upon what the Defendant shews to the Court as to the amount of other claims by advertisement or otherwise, and also what she shews as to the amount of the estate, and also what she can shew the Court to be *primâ facie* the extent of the Plaintiff's claim, regard also being had to the mode in which the Plaintiff, if he has any litigation in *Austria* and *Hungary*, conducts that litigation, and also the probable length of time that that litigation may occupy.

In my opinion the Appellant has entirely failed, and must pay the costs of the appeal, because although we vary the decree in order to make it more in accordance with what I think is the strict practice of the Court, I am satisfied that postponing the administration inquiries was not the reason for the appeal. The point insisted upon was the dismissal of the action in whole or in part, and in my opinion that contention was utterly wrong. The Lord Justice *Fry* has prepared minutes of our order.

BOWEN, L.J.:—

I am of the same opinion, and although our judgment to a certain extent decides the application of a somewhat recondite principle of English law, yet Lord Justice *Cotton* has so completely expressed my view about it that it would only be taking up time unnecessarily if I were to travel over the same ground again. I must also express my concurrence in what he has said as to the Appellant being precluded by the admissions in the order of April, 1886, from asking to have the action wholly or in part dismissed.

FRY, L.J.:—

I so entirely concur in what has been said by Lord Justice *Cotton* that I shall confine myself to reading the varied order which we propose to pronounce.

After much discussion as to some matters of detail the order was settled in the following form:—

Vary judgment of Mr. Justice *North*, and let judgment as varied stand as follows:—

Take (1) an account of all sums due from the estate of the testator to the Plaintiff.

(2) An account of all sums due from the Plaintiff to the estate of the testator, certifying the balance of the two accounts.

And at the request of the Plaintiff, and at his expense, certify how much of the sums included in accounts 1 and 2 respectively are capital and how much income.

For the purpose of taking the said account (1) declare that the estate of the testator is liable for the amounts, if any, for which, by the laws of *Austria* and *Hungary* respectively, the said estate or the allodial heirs of the testator is or are liable in respect of the deterioration of the estate comprised in the *Strattman fidei commiss*, the *Batthyany fidei commiss*, and the Hungarian *fidei commiss*, and let the Plaintiff be at liberty to take such proceedings as he may be advised in the Courts of *Austria* and *Hungary* respectively for the purpose of ascertaining the amount of any such liabilities.

And for the purpose of taking the said accounts declare as follows: That the Defendant *Annie Smith*, as the legal personal representative of the said testator, is entitled as against the Plaintiff to any sum which may be found due to the testator's estate or his allodial heirs according to the law of *Austria* forameliotions in respect of lands and estates comprised in the *Strattman fidei commiss* and the *Batthyany fidei commiss* respectively, not exceeding the amount which may be found due from his estate or his allodial heirs in respect of deterioration in respect of the same lands and estates respectively.

And that the Defendant *Annie Smith* as the legal personal representative of the testator, is also entitled as against the Plaintiff to any sum which may be found due to the testator's estate or his allodial heirs according to the laws of *Hungary* and *Croatia* for ameliorations in respect of the lands and estates comprised in the Hungarian *fidei commiss*, not exceeding the sum which may be found due from his estate or his allodial heirs in respect of deteriorations in respect of the same lands and estates.

And let the Defendant *Annie Smith* be at liberty to take such proceedings as she may be advised in the Courts of *Austria* and *Hungary* respectively for the purpose of ascertaining the said sums due for ameliorations and for the purpose of taking the said accounts.

By consent, declare that the income and outgoings of the estates in *Austria*, and *Hungary*, and *Croatia*, are apportionable between the Plaintiff and the Defendant *Annie Smith* for the current half-year or other term including the 25th of April, 1883, and that such income includes produce, wine, tithes, obligations, rent, and coupons or other income of securities belonging to the entailed estates or *fidei commiss*, and of deposits in savings banks, and that such outgoings include allowances to officials and servants, salaries, insurance, taxes, rates, and other public contributions, interest, and instalments on mortgages, and loans, and disbursements for sylvan economy.

The foregoing declarations are to be without prejudice to the right, if any, of the Defendant *Annie Smith*, to insist, either in *Austria* or *Hungary*, to claim for ameliorations in excess of deteriorations, and also to the right of either party to raise any question not inconsistent with the said declarations, and without prejudice to the powers of the Judge to grant liberty to take any further or other proceedings in *Austria* or *Hungary*.

If the balance of the said accounts shall be certified to be due from the Plaintiff to the Defendant (Plaintiff undertaking to pay the same) order payment by the Plaintiff. If the balance of the said accounts is certified to be due to the Plaintiff from the estate of the testator, if the Defendant *Annie Smith* admits assets, order for payment, if not, order for administration.

Liberty to Defendant to apply for liberty to advertise for creditors, and to pay creditors other than the Plaintiff and legatees of the testator.

Add three last paragraphs of judgment of Mr. Justice *North*.

Solicitors for Plaintiff: *Ashurst, Morris, Crisp, & Co.*
Solicitors for Trustees of real estate: *Walfords.*
Solicitors for Appellant: *Tyrrell Lewis & Co.*

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Lunatic—New South Wales—Person in New South Wales of Unsound Mind not so found by Inquisition—Payment to Master in Lunacy in New South Wales—New South Wales Lunacy Act, 42 Vict. c. 7.

A lady detained in a lunatic asylum in *New South Wales*, but not found a lunatic by inquisition, was entitled for life to the income (about £30 a year) of one third of a testator's residuary estate, and was absolutely entitled to a fund of about £2000 which had arisen from accumulations of this income. She had for years been maintained by the colonial government at a total expense of £803. By the *New South Wales Lunacy Act* extensive powers of management of the property of "lunatic patients" (*i.e.*, persons detained as lunatics but not found so by inquisition) were given to the Master in Lunacy of *New South Wales*, and he was enabled to sue for and receive debts due to the patient, but the Act did not vest the patient's property in him. The Master claimed to have the accumulations, which were in *England*, paid to him, upon which the trustees paid them into Court under the *Trustee Relief Act*. The Master petitioned to have them paid out to him. *Kay*, J., ordered payment to him of the £803, and also payment to him of the income of the remainder of the fund so long as the patient should be detained as an insane patient in *New South Wales*, and authorized the trustee to pay to him the patient's share of the income of the residuary estate, which the trustee undertook to do. The Master in Lunacy appealed:—

Held, that although the Master could enforce payment in *New South Wales* of any sums due to the patient, still as the patient had not been found lunatic, and her property was not vested in the Master, he could not compel payment of any moneys due to the patient from persons in this country, and that his claim as of right to have the whole of the accumulations made over to him could not be sustained:

But *held*, that a trustee here, or the Court acting as trustee, was justified in paying over to the Master anything which the competent authority in *New South Wales* decided to be necessary for the maintenance or benefit of the patient, and that the order therefore was right in ordering the payments which had been directed:

But *held*, that it was also right in declining to go further, no case having been made to shew that more was required for the comfort or benefit of the patient.

UNDER the will of *Francis Barlow*, who died in 1853, *Fanny Barlow*, one of his three daughters, was entitled for life to the income of one third of his residuary estate. She also became entitled on the death of her mother in 1858, under the same will, to a share, amounting to £157 16*s.* 4*d.* cash, in the proceeds of sale of a house. At the testator's death *Fanny Barlow* was in *New South Wales,* and had ever since been there. The £157 16*s.* 4*d.* and her share of the income of the residuary estate from the testator's death were invested and accumulated, and in December, 1886, the representative of the trustee of the will transferred and paid into Court under the *Trustee Relief Act* the sum of £2175 19*s.* 4*d.* New 3 per cent. Annuities and £74 13*s.* cash, the result of such accumulations. The cash was subsequently invested, which made up the fund to £2249 15*s.* 8*d.* Bank annuities, and the present proceeding related to this sum.

On the 10th of October, 1860, *Fanny Barlow* had been admitted as an insane patient into the public hospital for the insane at *Paramatta* in *New South Wales,* and had ever since remained there. She had not been found lunatic by any judicial proceeding. The payment into Court was made shortly after the receipt of a claim by the Master in Lunacy of *New South Wales* to have the accumulated fund transferred to him.

A petition was presented in February, 1887, by Mr. *Barton* the Master in Lunacy of *New South Wales,* and *Fanny Barlow* by Mr. *Barton* as her next friend, stating that *Fanny Barlow* had been maintained in the hospital at the expense of the colonial government at 12*s.* 6*d.* per week, and that the sum due to the government for her maintenance was £817 2*s.* 6*d.,* and asking for transfer of the whole fund to the Master in Lunacy. The amount shewn to be due for past maintenance up to the 5th of July, 1886, was £803 15*s.* (1).

(1) The Act of *New South Wales* passed in February, 1879, to consolidate and amend the law relating to the insane contained the following provisions:—

By sect. 3 an "insane person" was defined to be "Any person who shall for the time being be idiotic, lunatic, or of unsound mind, and incapable of managing himself or his affairs, and whether found insane by inquisition or otherwise."

"Insane patients" and "patient," "Any person detained at the commencement of this Act in any public or private establishment in *New South Wales* for the reception of insane persons, and any person hereafter received into and detained in any hospital, reception-house, licensed house or other place respectively appointed or licensed under the provisions of this Act for the reception of insane persons or patients."

Powers were given to the justices of the peace to order an insane person who had no sufficient means of support or was found wandering at large to be removed to a hospital or licensed house, and sect. 8 provided as follows:

The petition was heard by Mr. Justice *Kay*, who on the 24th of May, 1887, made an order to pay out of the funds in Court the

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Sect. 8: "Any person may be received and detained as a patient in a hospital for the insane, or a licensed house, on the authority of a request under the hand of some person, according to the form in Schedule 4, authenticated by a justice or minister of religion authorized to celebrate marriage, together with such statement of particulars as is contained in Schedule 5, and two medical certificates, each of which certificates shall be according to the form and contain the particulars required in Schedule 2 to this Act, and be signed by a medical practitioner who shall, separately from the medical practitioner who shall have signed or shall thereafter sign the other of such certificates, have previously examined the person to whom such certificate relates, not more than ten clear days previously to the reception of such person into such hospital or licensed house, and such request as aforesaid may be signed before or after the date of such medical certificates or either of them."

The Act contained elaborate provisions for the inspection of hospitals for the insane and licensed houses, and for the discharge of all persons detained without sufficient reason.

Sect. 92: "After the passing of this Act no commission *de lunatico inquirendo* shall issue, but in every case in which it shall be proved to the satisfaction of the Supreme Court or one of the Judges thereof that a person is of unsound mind, and incapable of managing his affairs, such Court or Judge may make a direction to that effect, and may direct a reference to the Master in Lunacy to make inquiries concerning the property of such person, and may make all proper orders for rendering the property of such person or the income thereof available for the payment of his debts, and for the maintenance and benefit of himself and his family, and for carrying on his trade or business (if any), and may, if necessary, appoint a committee of his estate, and also when desirable a committee of his person."

Part VIII., sub-div. 1, "General powers and duties of Master in Lunacy." Sect. 105: "There shall be a Master in Lunacy, and the Master in Equity for the time being of the Supreme Court shall be also the Master in Lunacy, and as such shall have and execute all the powers and duties hereby or under the authority hereof vested in and imposed upon him. And subject to and in accordance with the regulations of the Governor in Council and the General Rules of the Supreme Court, and to any special order of the said Court, the Master in Lunacy shall undertake the general care, protection and management or supervision of the management of the estates of all insane persons and patients in *New South Wales*. And he shall supervise and enforce the performance of the obligations and duties of all committees of insane persons heretofore or hereafter to be appointed, and shall take care of, collect and administer under the provisions of this Act the property and estates of all insane patients."

Part VIII., sub-div. 2, "Powers and duties of Master in Lunacy in respect to estates of insane patients." Sect. 141: "The Master in Lunacy shall have in respect of the property and estate of any insane patient in addition to the general powers conferred upon him in sub-div. 1 of this Part all the like powers and autho-

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£803 15*s.* and also to pay the dividends of the remainder of that fund to the Master in Lunacy, so long as *Fanny Barlow* was detained as an insane patient in *New South Wales.* The order also directed the trustee of the will to pay one third of the income of the residuary estate to the Master in Lunacy during the life of *Fanny Barlow* or until further order. This third share of income was, roughly speaking, about £30 a year.

The Master in Lunacy appealed, asking to have the whole of the fund in Court transferred to him. The appeal was heard on the 15th and 16th of June, 1887.

Ince, Q.C., and *Lyttelton Chubb,* for the Appellant:—

According to the Act of the colony of *New South Wales,* 42 Vict. c. 7, s. 2, interpretation clause, and sect. 105, the Appellant *Barton,* as the Master in Lunacy of the colony of *New South Wales* is the properly constituted authority to receive any money belonging to the lunatic.

[FRY, L.J.:—What evidence is there of the person being a lunatic?]

She is detained in the asylum as an insane patient; and by sect. 141 the Master in Lunacy has, with respect to an insane patient, the same powers as a committee of the estate of an insane person. By sect. 142 he can bring actions to recover her

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rities subject to the like limitations as are hereinafter in sub-div. 3 of this Part given to the committee of the estate of an insane person."

Sect. 142: "If any real or personal property of an insane patient be wrongfully held, detained, converted or injured, or if any sum of money be due and owing to such patient by any person, the Master in Lunacy may as such Master claim and recover possession of such property, or damages for the conversion or injury thereof, or payment of the said sum, by summary proceeding on complaint before any Judge of the Supreme Court, who is hereby authorized and required, on proof to his satisfaction of the said cause of complaint, to make an order requiring the defendant to give up possession of such property, or to pay reasonable damages, to be fixed by the said order, for the conversion or injury thereof, or to pay the sum so due as aforesaid."

Sub-div. 3 contained provisions as to the management of the estates of "insane persons." Its general effect was to enable the committee of the estate to surrender leases, accept renewed leases, and to effect sales, leases, mortgages, partitions and exchanges in the name and on the behalf of the insane person under an order of the Court.

property, and by sect. 143 he is to pay all moneys of the patient into the Treasury. By sect. 146 the Court may direct the Master to inquire into the insanity of any patient. By sect. 152 the committee is directed, in the name and on behalf of the lunatic, to execute deeds, &c., as the Court shall direct, and by sect. 170 stock belonging to the lunatic is to be transferred to the committee. The money ought to be sent out to the colony, where it is required. The next of kin object to the proposed transfer in order that they may keep their hands on the fund. The Court ought not to aid them in doing this. *Scott* v. *Bentley* (1) is on all fours with the present application.

[FRY, L.J.:—In *Scott* v. *Bentley* there was a finding of lunacy and a vesting of the lunatic's rights in the *curator bonis*.]

Newton v. *Manning* (2) shews that it is sufficient for the applicant to prove his title according to the decision of the foreign tribunal, and the Court here will order payment to him out of the fund. The Act contains elaborate provisions for guarding against the possibility of any person who is not really insane being detained as an insane patient: see sects. 16, 19, 22, 68, 69, 71, 90, 91, 143, and 144. The law of *New South Wales* entrusts the money of an insane patient to the Master in Lunacy.

[BOWEN, L.J.:—The money is safe here, and it is our duty to protect it.]

In re Elias (3) and *In re Stark* (4) are instances in which such payment has been directed. *In re Garnier* (5) is opposed to previous authorities, and cannot be sustained. *Hessing* v. *Sutherland* (6) shews that stock will be transferred into the name of the *curator bonis* of an English lunatic resident in *Scotland*. It is important to the colony of *New South Wales* and the other Australian colonies, whose *Lunacy Acts* are the same or similar, to have this question decided by this Court. There can be no hardship in requiring the next of kin of the insane patient, after her death, to apply to the Court of the country in which she died.

Curtis Price, for the Respondent, was not called upon.

(1) 1 K. & J. 281.
(2) 1 Mac. & G. 362.
(3) 3 Mac. & G. 234.
(4) 2 Mac. & G. 174.
(5) Law Rep. 13 Eq. 532.
(6) 25 L. J. (Ch.) 687.

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1887. June 17. COTTON, L.J.:—

This is an appeal against an order of Mr. Justice *Kay*, so far as he declined to transfer out to the Master in Lunacy of *New South Wales* a fund in Court, and declined to do more than direct payment to the Master of the past expenses of maintenance of the patient, and payment of the dividends arising from the remainder of that fund, the trustee of the will, under which that fund arose, who appears here, undertaking to pay from time to time to the Master the income to which the lady was entitled, arising from the funds in the hands of the trustee.

The point, which undoubtedly is an important one, was argued very earnestly and very fully on the part of the Appellant; but in my opinion the decision was right. Who is the person who applies here to have this fund transferred to him? It is true that the petition is presented not only by the Master, but by the lady; but the lady petitions by her next friend. That is an admission that she is not entitled to present the petition herself, and we must therefore regard this as the petition of Mr. *Barton* alone.

We have been referred to the *Lunacy Act* of *New South Wales*, passed in February, 1879, and undoubtedly that Act contains provisions which make it practically impossible that any one should be in an asylum without sufficient reason. But that is not the point which we have to consider. The question is whether the Master has of right a claim to have this capital fund transferred to him. The lady is and has for a considerable time been in an asylum, called an hospital for insane persons. The Act draws a distinction between two classes of persons—insane persons and insane patients. The lady comes within the class of insane patients. An insane patient is "any person detained at the commencement of this Act" (as this lady was) "in any public or private establishment in *New South Wales* for the reception of insane persons." There are certain provisions in the Act for the benefit of herself and her property, if she is an insane patient, even although she may not be of unsound mind. I do not doubt that she is of unsound mind, but there is no judicial declaration, no order expressly or impliedly containing a judicial decision that she is of unsound mind, and that is material; but I do not think that the case is to be decided on that ground.

We find in this Act that in the case of insane patients, that is to say persons in an asylum but not judicially found insane, powers are given to the Master for the purpose of providing for their maintenance, and for getting in, and therefore protecting and securing any property they may have; but besides those powers there are to be found in Part VII. of the Act, sect. 92, provisions similar to those of the English *Lunacy Act*, enabling inquiries to be made as to whether a person alleged to be insane is so, and if he be so, then to appoint a committee, just as would be the case in *England*. Now where a committee is appointed, even though the Master may have authority under this Act to act in requiring payment of money or in providing certain things to be done for the lunatic, there is a vesting of the right to the custody of the property of the lunatic, so far as this Act could vest it (and I think it would apply to all personal estate wherever situate) in the committee, just as would be the case in *England*. As regards the Master, there is nothing of the kind. He has only authority given to him for certain purposes (which will be material in considering the second part of this case) to act for the insane patient; no title to the property is vested in him, except so far as the right to be sued and to sue gives him a title. In my opinion that does not entitle the Master to say that as of right he shall have this fund transferred to him. In the colony it may be that no one could refuse to act on the provisions of this Act, and decline to pay to the Master whatever was due to the insane patient. Why? Because this Act is compulsory as against any person who is residing within the limits of the colony; but no Act of the Legislature of *New South Wales* can compel any one here in *England* to pay to the Master, who has no title to the property, anything belonging to the insane patient. No trustee in *England* could be compelled to obey the Act of Parliament of *New South Wales*, and to transfer a trust fund to the Master, in whom no property in the fund is vested. His claim as of right must therefore fail.

Then ought we to and can we hand over to the Master these capital moneys? As I understand the Act, it gives power (as of course any well-considered Act relating to lunatics would do) to do whatever is necessary for the comfort and benefit of the

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lunatic. It is very true that here (we cannot now enter into the question of whose fault it was) there has been apparently a very insufficient provision for this lady; but that ought not to lead us to hand over to the Master in Lunacy, who has no right to have it, anything which it is not shewn to be for the benefit of the lunatic to have handed over to him. In my opinion, if it is shewn hereafter that a further sum than the interest of this money, which altogether amounts to something over £70 a year, is required for the maintenance of this lady, then in my opinion the matter will stand in a very different position. But on the present occasion, without any *constat* that the lunatic really requires for her maintenance, or for such comfort as she can enjoy, a larger sum than the income, we are asked as a matter of right to hand over to the Master the whole of this principal sum. I think that is wrong. If indeed the proper authority acting under the Act had settled that certain things should be done for the lunatic which could not be done out of the income, this Court would not enter into the question whether the authorities in *New South Wales* had acted erroneously or had not properly exercised their discretion in the matter. In my opinion, if such a case came before the Court, this Court ought to order payment over of so much of capital as might be necessary in order to provide for what the proper authorities had determined to be necessary for the benefit of the lunatic.

But it may be said, "How can that be done if the Master has no title to the property, and cannot compel the payment of anything here in *England*, and how is it that the order authorizes the trustees to pay, and in fact orders payment of certain dividends and income to the Master?" The answer, according to my view of the Act, is that the Master has been appointed a sort of guardian for the person who is found in the lunatic asylum, to do two things—to protect the property of that person and to do what is necessary to provide for the maintenance of that person. If it is shewn by any direction given by the competent authority in *New South Wales* that a certain sum is required for the maintenance of this lunatic, then I think that although the Master cannot compel payment, yet the Court, or a trustee, would be perfectly justified in paying over that sum to the Master out of the moneys here.

In my opinion this appeal has failed, and without at all determining that no such order as is now asked for could be made in the future under an altered state of circumstances, I am of opinion that the Master is not of right entitled, without shewing the reason for which he requires it, to have this capital money now paid over to him, and that at present there is nothing to justify us in considering that a larger sum than that which has been ordered to be paid to him is reasonably required for the maintenance of the lunatic, or ought on that account to be paid to him.

BOWEN, L.J.:—

I am of the same opinion, and I agree entirely with the views which the Lord Justice has expressed. As, however, we are told that this is a matter of importance, I will add a few words in order that those who have conducted the case may be satisfied that we are all of one mind.

I start with this, that the Master has no title to ask that this payment should be made to him as of right. By the legislation of the colony in the present case there has been no actual vesting of the insane person's property so as to effect a devolution of the estate. There has been no change of status of the lunatic even as far as regards her rights to personal property. She is an "insane patient" confined for the time in a hospital. By the term "insane patient" is meant a person who is treated as insane without any inquest or determination in law having been made as to her state of mind. With regard to such person, by the legislation of the colony, although there is no vesting of the property of the patient in the Master in Lunacy, there is given to him a power of what I may call interim possession and management of the property; he is made a kind of guardian, clothed with what may for the purpose of illustration be compared to a statutory power of attorney, to act for her, without her assent, in respect of her property in the colony, and for the protection of the property. Now such a statutory power would justify all payments made to the Master on her behalf by persons in the colony, and I think the consequence would be the same as if there had been a statutory release granted to all persons in the colony who made

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such payments. I think that a debtor might go over to the colony and might safely pay there to the Master in Lunacy. But such legislation, which does not operate upon the status of the lunatic or upon her final right to the possession of her property, cannot affect property outside the colony. Although the Master in Lunacy in the colony could compel payments, although in the colony he could lawfully receive payments, and such payments when made would, as I think, operate for all purposes and everywhere as a discharge to those who made them, nevertheless he cannot under this statute compel payments outside the colony, and having no right to compel them, we cannot accede to the view that he is here presenting a petition for something which he is entitled to claim as of right.

Having decided that point I think we really have decided the case before us, for the Master in his petition has not aimed at making out any case upon the facts for the intervention of this Court and the application of its discretion in the direction which he seeks, but rests his case on his supposed statutory title. According to the view which Lord Justice *Cotton* and I have both expressed, we think the Court under such circumstances has power in law to send the money over to the colony if we thought that it was right to do so. But on what principles ought that discretion or power to be exercised? The Court ought to act here exactly on the principles on which a careful trustee in *England* of a lunatic's property would act, and I do not think that a trustee would be justified in sending over to the Master in Lunacy in the colony property of the lunatic unless the trustee could see that it was reasonably necessary for the protection of the property or for the maintenance of the lunatic that the transfer should be made. Therefore we have to consider whether it is shewn to our satisfaction that it is reasonably necessary to transfer this property to the colony for the purpose of protecting the property or for the purpose of maintaining the lunatic. The property stands in no need of protection, so that ground disappears, and it seems to me no case has been made out which ought to satisfy us, acting, as I said before, on the principles on which a careful trustee would act, that this further payment is necessary for the maintenance of the lunatic.

I desire most emphatically to add my voice to what has been said by the Lord Justice as to the provisions of the colonial legislature being above all comment and criticism as regards these insane patients. We have the most ample confidence not only in the legislation, but in the officers of the colony who administer the law, and I myself feel no doubt that the interests of the lunatic would be as well cared for by the Master in Lunacy in the colony as they would be cared for by the Master in Lunacy here if she was here, and that she is surrounded by all the protection and safeguards that could reasonably be invented for the purpose of taking care of her and of her property. But still it is not made out to our satisfaction that the Master in Lunacy or the Court which has direction of the matter has formed any opinion that further payments ought to be made to the Master in Lunacy for the purpose of the maintenance of the insane patient, or that they are reasonably required for that purpose. If such a case was made out, I entirely agree in what the Lord Justice has said, that we should deal with the case upon its merits, with every desire to give full weight to our feeling of trust and confidence in those who administer the property of insane patients in the colony.

FRY, L.J.:—

I am of the same opinion.

This case arises with respect to a sum of money paid into Court under the *Trustee Relief Act*. The Court, therefore, is placed in the position of the trustee, and whatever the trustee was bound to do the Court is bound to do, and whatever a reasonably prudent trustee may do the Court may do. Whatever a trustee could not or ought not to do the Court cannot and ought not to do. Whatever we do, therefore, in this case, does not depend on any discretion vested in the Court, either in respect of lunatics or as a Court of Appeal from the Chancery Division, we are merely performing that duty which the trustee was called upon by his trust to perform.

It appears to me that there is a broad distinction between legislation and judicial decision which deal with the personal status of an individual, and create a consequential devolution of the title to property, and legislation and judicial decision which affect the management of property of particular persons without any determination of their status. Declarations of a competent Court with regard to the status of a person receive in foreign Courts a degree of consideration which cannot be paid to mere domestic legislation with regard to the management of property—directions with regard to management not consequential upon a determination of status. That distinction between the two modes of dealing with property finds the clearest expression in the colonial statute with which we are concerned in the present case. By the 92nd section the Legislature of the colony has provided for a declaration that a person is of unsound mind and incapable of managing his affairs, and the Act contains certain consequential legislation with regard to a person whose status is so altered by a declaration of lunacy. But in addition to that the Legislature of the colony was minded to provide for persons whose status was not altered by judicial declaration, but who, according to the view of the Legislature, required care. They introduced certain provisions for the management of their property without determining or altering their status. Now, in the present case, the alleged lunatic is a person who has not been dealt with by any judicial declaration of status, and there is nothing, therefore, which this Court is bound to regard as affecting the status of the person. I think, therefore, that the present Appellant, the Master in Lunacy of the colony, has no right to call upon the trustee, and therefore no right to call upon the Court, to pay the *corpus* of the fund to him. I think his position would have been materially different if there had been a declaration of lunacy by the competent colonial Court, and he had been invested with the estate of the lunatic as a consequence of that declaration. We have only certain provisions which affect the management of the property, and affect it, it appears to me, in the colony. I do not see that the colonial Legislature can by that mode of legislation affect Courts outside the colony or affect trustees outside the colony.

I see, therefore, no ground upon which the Master in Lunacy can claim the entire fund.

The greater difficulty, in my mind, has been to find out how he is entitled to any portion of the fund; but I agree with the Lords Justices who have preceded me, that a prudent trustee would be at liberty to pay such sums as by this order are directed to be paid to the Master in Lunacy, on the ground that he is a person who is placed in the position of a *quasi* guardian for this unfortunate lady, and that the sums which are so paid are paid by way of maintenance for her, and that the trustee, therefore, would be in a position to say to the lady, supposing she recovered, and he had paid over the entire sum, "I have paid to a proper person in the colony certain sums for the supply of necessaries to you." That, I think, would be a good answer in the mouth of the trustee to this lady if she set up a title to the sums which are now directed to be paid to the Master.

I think, therefore, that the order was right in going to the extent to which it did, and I think it was right in refusing to go any further. This appeal, therefore, fails.

Solicitors for Appellant: *Wyatt & Barraud.*
Solicitors for Respondent: *Spencer, Gibson, & Co.*

H. C. J.

In re ADAM EYTON, LIMITED.
Ex parte CHARLESWORTH.

C. A.
1887
July 6, 7.

Company—Winding-up—Removal of Liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 93, 141 [*Revised Ed. Statutes, vol. xiv. pp.* 223, 233]—*Appeal by Liquidator.*

The jurisdiction of the Court to remove a liquidator under ss. 93 and 141 of the *Companies Act*, 1862, "on due cause shewn," is not confined to cases where there is personal unfitness in the liquidator. Whenever the Court is satisfied that it is for the general advantage of those interested in the assets of the company that a liquidator should be removed, it has power to remove him, and appoint a new one.

In re Sir John Moore Gold Mining Company (1) explained.

A liquidator who has been removed by a Judge may appeal against his removal.

Whether a judge can re-hear in Chambers an order which he has previously made in Chambers, but which has not been drawn up—*quære.*

ADAM EYTON, LIMITED, the above-named company, was incorporated in 1886 for the purpose of carrying on the business

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of lead, silver, and gold smelters, and for purchasing the business and lead-smelting works of *Adam Eyton & Son, Llanerchymor,* in *Flintshire.* The capital of the company was £75,000, in shares of £10 each.

On the 23rd of April, 1887, an order was made to wind up the company, and on the 19th of May, *J. S. H. Banner,* an accountant of *Liverpool,* was appointed official liquidator. He was proposed by the petitioning creditor and several other creditors.

William Charlesworth was a creditor of the company to the amount of £490, and *Adam Eyton,* who was his father-in-law, and the vendor of the works, claimed £20,000 against the company; but the amount of his debt was disputed. The only other claims of creditors which had been brought in amounted to about £2380. If the debts of *Charlesworth* and *Eyton* were allowed, the company could not pay its debts in full; but if those debts were not taken into account the company could pay all the other creditors in full. Before the order appointing *Banner* liquidator had been drawn up, and before he had perfected his security, *Charlesworth* applied to Mr. Justice *North* in Chambers to substitute *A. W. Chalmers* as official liquidator of the company in the place of *Banner,* the applicant undertaking if *Chalmers* were appointed to pay £2500 into Court to meet the claims which had been brought in, except his own and *Eyton's.*

No charges of personal misconduct or inefficiency were made against *Banner.*

On the 20th of June his Lordship, after hearing counsel for the official liquidator and the other parties, made the following order:—

"The applicant by his counsel undertaking, on or before the 13th of July, 1887, to pay into the *Bank of England* to the credit of the account of the official liquidator of *Adam Eyton, Limited,* the sum of £2500, and to pay any further sum of money to the like credit as the Judge may direct, in respect of claims brought in by the creditors of the above-named company other than those named in the schedule, and also undertaking to pay all costs, charges, and expenses as between solicitor and client of the said *J. S. H. Banner,* including the costs of passing his final account, &c., the Court doth hereby appoint *A. W. Chalmers,* of

&c., official liquidator of the above-named company in the place of the said *J. S. H. Banner.*"

The schedule contained all the claims against the company which had been brought in except those of *Charlesworth* and *Eyton.*

From this order *Banner* appealed.

Cozens-Hardy, Q.C., and *Oswald*, for the Appellant:—

An official liquidator can only be removed by the Court "on due cause shewn": *Companies Act*, 1862, s. 93. The cases all go on the principle that though there need not be fraud or dishonesty, there must be something in the nature of a personal objection to the person sought to be removed: *In re Sir John Moore Gold Mining Company* (1) in winding-up; and the cases in bankruptcy, *Ex parte Sheard* (2); *Ex parte Newitt* (3). Here no objection is taken to the liquidator first appointed. The Judge has determined to appoint the new one because *Charlesworth* offered to pay a large sum to the credit of the official liquidator if his own nominee was appointed. It would be a dangerous precedent to allow any one to purchase the appointment of a liquidator in this way. Such a plan might be resorted to by a person who had had transactions with the company which he wished to conceal, and for that purpose to obtain the appointment of a friendly liquidator. It will be urged that as the order appointing *Banner* had not been drawn up the Judge could re-hear it, and that the matter stands on the same footing as if the new liquidator had been appointed in the first instance. But under the *Judicature Act*, 1873, s. 50, the Judge cannot discharge in Chambers an order made in Chambers.

[FRY, L.J.:—I have an impression that he can re-hear it before the order has been drawn up.

COTTON, L.J.:—I am disposed to hold that after an order has been pronounced, and nothing remains but to draw it up, it cannot be re-heard.]

This application has been treated throughout as one to remove a liquidator.

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(1) 12 Ch. D. 325, 330, 332.
(2) 16 Ch. D. 107.
(3) 14 Q. B. D. 177.

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Napier Higgins, Q.C., and *Hatfield Green*, for the Respondent *Charlesworth* :—

Banner has no *locus standi* to appeal against the order of the Judge. The Judge had a discretion to select whom he pleased, and the man that was rejected has no power of appealing. The order appointing him was only inchoate, and in such case the Judge has a right to reconsider his opinion.

If the order is considered as made under sect. 93 of the *Companies Act*, 1862, the Judge was acting within his powers. The words "on due cause shewn," have not the restricted meaning which it is sought to put upon them. If it is shewn to be for the benefit of all parties interested in the winding-up that a liquidator should be removed, the Court has full power to remove him. In the present case *Charlesworth* has offered to pay into Court sufficient to pay all the debts in full except his own and *Eyton's ;* and to refuse such an offer would be most injurious to the interests of the creditors.

C. H. Turner, *Dunham*, and *Pochin*, for other parties.

Cozens-Hardy, in reply.

COTTON, L.J. :—

This is an appeal by Mr. *Banner*, who at one time was liquidator of this company, against an order of Mr. Justice *North* in Chambers removing him from being liquidator, and appointing in his stead a Mr. *Chalmers*, who is also an accountant at *Liverpool*, as Mr. *Banner* is.

Several points were raised: one was this, that Mr. *Banner* had no *locus standi* to appeal. All the Court entertain a strong opinion upon that point. Of course he could not have been removed without giving him an opportunity of appearing before the Court and stating reasons why he should not be removed. That being so, if the Court did not listen to those reasons, and he was advised that the Court fell into error, he has a right of appeal and has sufficient *locus standi* here.

We then come to the question, was the Court right? Had it power under the 93rd section of the *Companies Act*, 1862, in the circumstances of the case, to remove him? The Act says, "Any official liquidator may resign or be removed by the Court on due cause shewn." Now, I think the matter comes under that section for this reason, that although the order appointing the liquidator had not been drawn up, there had in fact been an order of the 19th of May appointing him liquidator; and this order, which is under appeal, was made on the 20th of June, and was made on the footing of its being an order to remove the liquidator; and although the order had not been drawn up, in my opinion he was liquidator, though he had not given security. The security is given after the liquidator is appointed, and it is not a condition of his being appointed, although of course if anyone who is appointed a liquidator, and ordered to give security, delayed for so long a time, either in drawing up the order or in giving security, that the Court might reasonably come to the conclusion that he did not desire to fill the office and had abandoned it, then it might be very material whether the order had been drawn up, or whether security had been given. But here we know that Mr. *Banner* was anxious to draw up the order, and that he was stopped in consequence of the summons upon which this order was made.

We must therefore consider it as a question of removing Mr. *Banner*. Now, in my opinion, it is not necessary, in order to justify the Court under this section in removing the liquidator, that there should be anything against the individual. In my opinion, although of course unfitness discovered in a particular person would be a ground for removing him, yet the power of removal is not confined to that, and I do not think that the late Master of the Rolls in the case of *In re Sir John Moore Gold Mining Company* (1), which has been cited, intended to give an exhaustive definition. In fact he points out that, and what he says is this: "I should say that, as a general rule they point to some unfitness of the person—it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up—some unfitness in a wide sense of the term." He does not intend to exhaust all the grounds, but, in my opinion, and I believe the rest of the Court agree with me, if

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the Court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the Court has power to remove the present liquidator, and of course then to appoint some other person in his place.

Now what were the circumstances here? I do not in any way enter into those various questions which are raised by one side or the other, but it appears that Mr. *Eyton*, who is the father-in-law of Mr. *Charlesworth*, has large claims, as he contends, as against the company. That is disputed by another section of those who are interested in the liquidation, namely, certain creditors, and Mr. *Eyton* and Mr. *Charlesworth* also dispute the claims of certain persons who appear to claim as creditors against this company. But then we are informed by Mr. Justice *North* that the contest was conducted before him on the footing that if the claims of *Eyton*, *Charlesworth*, and of the other persons named in the schedule to the order, came into competition together, there would not be enough to pay 20*s*. in the pound, that is to say, that the company was insolvent, and could not pay its debts in full, and that was the basis of the order upon which the matter proceeded; and on the evidence, as far as I can see here before us, I should have thought probably the parties were quite right in the mode in which they viewed the circumstances of this company. And I mention that especially for this reason—Mr. *Cozens-Hardy* in reply said, that an order like this, where a company was solvent, would produce very great evils and be a very bad precedent. I entirely agree. In my opinion it would be wrong, where it was conceded that a company was solvent, that the Court should, because a sum of money was offered by one who wishes another liquidator to be appointed, merely on that ground to remove the existing liquidator. That would not be a due cause, it would be like buying the liquidation, so I should entirely dissent from that. Liquidators ought not to consider themselves partizans either on one side or the other. But here it is a company which, on the evidence, must be treated as insolvent, and which was treated as insolvent when the matter was before Mr. Justice *North*.

But Mr. *Charlesworth* says: "Mr. *Eyton* and I are together very large creditors, and I will take the loss upon myself in this way: I will pay all the other creditors if the assets are not sufficient to pay them, and bear the loss by taking the property into my own hands and providing out of that for whatever may be due to Mr. *Eyton* and myself." Under those circumstances the matter bears a very different aspect. I think the order is not unreasonable under those circumstances. We have the opinion of Mr. Justice *North*, who knows Mr. *Chalmers* as well as Mr. *Banner*, that although he is quite satisfied that Mr. *Banner* would conduct the matter duly and properly, and that there is no possible imputation or ground of imputation in this case against him, he is also satisfied that Mr. *Chalmers* would also conduct the liquidation fairly and not raise any unnecessary or groundless objection to any claims which may be brought forward by those who claim to be creditors, and whose debts, if established, Mr. *Charlesworth* undertakes to pay. In my opinion, therefore, the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion. Mr. *Banner* may consider that the judgment of this Court is not based in any way on the possibility of any reflection upon himself, either in his conduct in this matter or in his general fitness to be liquidator of any honourable company in the kingdom. We do not decline to vary the order of Mr. Justice *North* because Mr. *Banner* is in any way implicated in anything which he has any reason to fear. On the contrary, his character is clear.

With regard to the facts of the case, I will say nothing. I will only add two or three words to point out what is the importance of our decision as to the law. In this case it is not necessary, in my opinion, to decide for the first time what I think always has been the law; that a liquidator once appointed has a *locus standi* to appeal to this Court against his removal, and that a liquidator, when he is appointed, is not the less appointed because he has not, at the time the appeal comes on, perfected his right to act by giving security. The security is to be given on his appointment, that is to say, immediately after his appointment. The case, therefore, is not important for that reason, but I do think it is an important case to the profession because a contention was raised by Mr. *Cozens-Hardy*, and based upon the language of Sir *George Jessel*, the late Master of the Rolls, in *In re Sir John Moore Gold Mining Company* (1), to the effect that unfitness in the liquidator ought to be shewn before he is removed. If anybody understands Sir *George Jessel's* language in that case to mean that, I think that this Court ought now to lay down that such an apprehension of his meaning is incorrect, and that it is not the sole ground under the statute for which a liquidator can be removed.

In many cases, no doubt, and very likely, for anything I know in most cases, unfitness of the liquidator will be the general form which the cause will take upon which the Court in this class of case acts, but that is not the definition of due cause shewn. In order to define "due cause shewn" you must look wider afield, and see what is the purpose for which the liquidator is appointed. To my mind the Lord Justice has correctly intimated that the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation. That should be thoroughly understood, I think, as of great importance; and in that sense it seems to me this case is of interest because it clears, once and for all, away the misconception upon which the argument of the Appellant's counsel was based.

FRY, L.J.:—

I have nothing to add but to express concurrence with my Brethren.

Solicitor for Appellants: *T. Hulbert.*

Solicitors for Respondents: *Pitman & Sons*, agents for *Brown, Wilkin, & Scott, Wakefield; Layton & Steel, Liverpool; Miller & Miller; F. Burchell.*

M. W.

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(1) 12 Ch. D. 331.

In re AVERY'S PATENT.

C. A.
1887
STIRLING, J.
Jan. 15;
Feb. 19, 21, 23.
C. A.
July 15, 16, 18.

Patent—Petition for Revocation—Alleged Fraud on Rights of Petitioner—Non-disclosure on Specification of Fact of Communication from Abroad—Parties—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), s. 26, *sub-s.* 4 (*c*), (*d*).

Sect. 26, sub-sect. 4 (*c*), of the *Patents, Designs, and Trade Marks Act*, 1883, applies only to cases of fraud, and will not be extended to cases of mistake, though the consequences may be to deprive the inventor of his patent rights.

A., a subject of the *United States of America*, and resident there, gave a power of attorney to *W.*, his agent in *England*, with instructions to obtain a patent in this country. *W.* employed *L.* as his substitute under the power of attorney to obtain the patent, and *L.* took out a patent in his own name for the invention together with some improvements which he had made himself, without stating in the specification that it or any part of it was a communication from abroad: and made a statutory declaration that he was himself the first and true inventor. *L.* had no fraudulent intention in taking out the patent in this form, and acted under the advice of a competent patent agent.

A petition was presented under the *Patents, Designs, and Trade Marks Act*, 1883, s. 26, sub-s. 4 (*c*), by *K.*, an attorney appointed by *A.*, alleging that the patent was granted "in fraud of the rights of *A.*," and asking for the revocation of the patent, and a declaration that *A.* was the first and true inventor. The petition contained no distinct allegation that *A.* was the first and true inventor.

The petition was ordered by *Stirling*, J., to be amended by making *A.* sole petitioner, and all persons beneficially interested in the patent respondents:—

Held, by the Court of Appeal (affirming the decision of *Stirling*, J.), that, even if the patent was void by reason of the non-disclosure in the specification of the communication from abroad, as there was no proof of any intention on the part of the patentee to deprive *A.* of his rights, the petition could not be sustained under clause (*c*): and it was dismissed without prejudice to any petition which *A.* might be advised to present under clause (*d*) as a person claiming to be the first and true inventor.

But the Court gave no opinion on the question whether the patent was or was not void.

THIS was a petition for the revocation of a patent granted on the 8th of June, 1885, to *Thomas Lindsay* for improvements in the means of generating fixed gases for illuminating, heating, and metallurgic purposes. The petition was presented under the *Patents, Designs and Trade Marks Act*, 1883, s. 26 (1).

The petition stated the following facts, which were not substantially disputed :—

On the 12th of May, 1885, a patent was granted in the *United States of America* to *R. B. Avery*, who resided in that country, for improvements in the apparatus for the manufacture of vapours and gaseous fuel and illuminating gas.

By a power of attorney of the 20th of January, 1885, *Avery* authorized *B. F. Weeks*, who was then also in *America*, to apply for letters patent in *England* and elsewhere for all his inventions then perfected or which he might thereafter perfect in processes for heating, lighting and metallurgical purposes. On the same day an agreement was entered into between *Avery, Weeks, Lindsay* and *W. F. Brewster,* whereby they all became interested beneficially in equal shares in the patents which it was proposed to obtain, and which by the same instrument *Weeks* contracted to apply for. On the 17th of April, 1885, *Weeks,* having then returned to *England,* appointed *Lindsay* his substitute as *Avery's* attorney to apply for the grant of letters patent. *Lindsay* undertook the testing of the invention, and in consequence of the imminent publication of *Avery's* patents in *America* it was judged advisable to file a provisional specification before the experiments were completed. *Lindsay* was advised by Mr. *Justice,* a patent agent, that he might properly describe himself in the specification as the true and first inventor. At the time when the complete specification was filed it was found that an improvement could be made in a part of *Avery's* process, and an improved form of apparatus, which had not been contemplated by *Avery,* was included in the complete specification. *Lindsay* made the application for the grant to himself in his own name; and also made the requisite declaration as set forth in the form in the schedule to the Statute of 1883, in which there is no reference to a communication from abroad, and not in the form prescribed by the Rules of the Board of Trade as applicable to inventions communicated from abroad (1). The grant of the letters patent was accordingly made to *T. S. Lindsay* in his own name, and did not express that it was made on a communication from abroad; and the improvements made by *T. S. Lindsay* were not in the specification distinguished from the rest of the invention.

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(1) 46 & 47 Vict. c. 57, s. 26, provides that :

1. "The proceeding by *scire facias* to repeal a patent is hereby abolished."

2. "Revocation of a patent may be obtained on petition to the Court."

3. "Every ground on which a patent might, at the commencement of this Act, be repealed by *scire facias* shall be available by way of defence to an action of infringement and shall also be a ground of revocation."

4. "A petition for revocation of a patent may be presented by—

"(*a*) The Attorney-General in *England* or *Ireland*, or the Lord Advocate in *Scotland*.

"(*b*) Any person authorized by the Attorney-General in *England* or *Ireland*, or the Lord Advocate in *Scotland*.

"(*c*) Any person alleging that the patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims.

"(*d*) Any person alleging that he, or any person under or through whom he claims, was the true inventor of any invention included in the claim of the patentee.

"(*e*) Any person alleging that he, or any person under or through whom he claims an interest in any trade, business or manufacture, had publicly manufactured, used or sold within this realm, before the date of the patent, anything claimed by the patentee as his invention."

8. "Where a patent has been revoked on the ground of fraud, the Comptroller may, on the application of the true inventor made in accordance with the provisions of this Act, grant to him a patent in lieu of and bearing the same date as the date of revocation of the patent so revoked, but the patent so granted shall cease on the expiration of the term for which the revoked patent was granted."

Sect. 35 is as follows : "A patent granted to the true and first inventor shall not be invalidated by an application in fraud of him, or by provisional protection obtained thereon, or by any use or publication of the invention subsequent to that fraudulent application during the period of provisional protection."

The petition was originally presented by *E. Kimber,* a solicitor, acting under a power of attorney for *R. B. Avery.*

The Petitioner complained that the patent was obtained by *Lindsay* in fraud of the rights of *R. B. Avery,* and asked for the revocation of the patent and a declaration that *R. B. Avery* was the true and first inventor of the invention, but did not contain a distinct allegation that he was the true and first inventor.

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(1) Rule 27 of the Rules of the Board of Trade provides that an application for a patent for inventions communicated from abroad shall be made in the form A 1 set forth in the 2nd Schedule, which is as follows: "I declare that I am in possession of an invention which invention has been communicated to me from abroad, and that I claim to be the true and first inventor thereof."

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Lindsay, the patentee, in his affidavit, distinctly denied all fraudulent intention in what he had done. He said, in paragraph 12 of his affidavit, "It is absolutely untrue, as alleged by Mr. *Kimber*, that I conspired with *Weeks* to wrongfully and by fraud obtain from the Crown the grant of letters patent for the said invention to myself on behalf of myself, as true and first inventor within this realm. I am advised and believe that I am the first and true inventor within this realm of the said invention within the meaning of the above-mentioned Act, and I have never alleged that I was interested in the said letters patent otherwise than for and on behalf of the said *R. B. Avery* and the other parties interested therein under the said agreement of the 20th of January, 1885. I am, and always have been, ready and willing to share with the said *R. B. Avery* and the other persons interested as aforesaid under the said agreement of the 20th of January, 1885, the full benefit of my labour and experience, and of any improvements made by me in connection with the said invention."

The petition came on to be heard before Mr. Justice *Stirling* on the 15th of January, 1887.

Oswald (with him *R. W. Wallace*), for the Petitioner, having stated the object of the petition,

Hastings, Q.C. (with him, *Yate Lee*), for *T. S. Lindsay* :—

There is a preliminary objection to the petition being heard. All the parties interested in the grant of the letters patent, which was by an agreement in January, 1885, vested in four persons in one-fourth shares, are not before the Court. Two persons interested have not been made respondents, and it is submitted that they ought to be.

Oswald :—

This is not an action in any way seeking to enforce the benefit of a patent. Sub-sect. 4 of sect. 26 of the statute states who may present a petition, and in this case clauses (*c*) or (*d*) are applicable.

[STIRLING, J. :—The Petitioner comes here as attorney under a power from *Avery*. That may give him authority to use *Avery's* name, but he cannot present a petition in his own name.]

I submit that the Petitioner stands in the place of *Avery*, and is competent to present a petition, or to bring any proceeding in his own name. The power states that he is to do everything in his own name. The objection is a highly technical one. Any person interested comes within either of these clauses, and it is not requisite that every person who alleges an interest should be before the Court. No amendment is, it is submitted, necessary.

STIRLING, J. :—

All that I can do under the section is to revoke the grant of the letters patent, and how can I do that in the absence of the parties who are stated to be interested in it? This is a proceeding to have something done which would destroy the grant, and would destroy the rights of *Brewster*, who is in *America*, and appears to be acting with *Avery*, and of *Weeks*, who has made an affidavit and appears to be acting with *Lindsay*. The absent persons may be able to state something which would estop the Petitioner, and, consequently, I think that they should be made Respondents. I will give you leave to amend the petition. Mr. *Kimber* is not a proper Petitioner, not being entitled to present a petition in his own name.

The petition having been amended by making *R. B. Avery* the Petitioner, and all other persons interested in the grant Respondents, it came on to be heard upon the 19th of February.

Hastings, Q.C., for a Respondent :—

By sub-sect. 7 of sect. 26, the Defendant is entitled to begin, and I am prepared to do so, but I will waive my right to begin, retaining my right to reply if it should be required.

Oswald, and *R. W. Wallace*, for the Petitioner :—

It is not disputed that the grant of letters patent in *America* was in respect of the invention of *Avery*; and the grant in this country to *Lindsay* was for the same invention, except as alleged, for some improvement of *Lindsay's*; but in the grant there is nothing to distinguish any improvement. The power of attorney ought to have been strictly followed, but *Lindsay* made a false declaration when he applied for the grant, as it stated that he was the true and first inventor. Although an invention communicated by a foreigner abroad to and imported by an agent in this country, may be the subject of a grant of letters patent, a communication made by one person to another in this country cannot be: *Marsden* v. *Saville Street Foundry Company* (1). *Weeks* was the person to whom *Avery* communicated his invention, and the only way in which *Lindsay* could have become aware of the invention was by a communication from *Weeks*. Therefore *Lindsay* was not the true and first inventor within the provisions of the statute 21 Jac. 1, c. 3. The grant was not made as upon a communication from abroad in accordance with the rules of the Board of Trade made under the Act of 1883, s. 101. The omission to state the facts was a fraud upon *Avery's* rights. But independently of the rules, it is clear upon the authorities that where an invention is communicated from abroad the grant should be obtained as upon such communication. That was the practice before the Act of 1883: *Milligan* v. *Marsh* (2). If there was any improvement in the invention of *Lindsay*, he should have distinguished it from the communication; but the grant was in fact for *Avery's* invention. In *Renard* v. *Levinstein* (3) the Court of Appeal held that where an invention was partly original and partly communicated from a foreign country the latter part should be distinguished in the specification, and for the protection of the public it was necessary that that should be done. If all the facts were not set forth the public could not know what was new and what was communicated.

It is not necessary to shew that *Weeks* and *Lindsay* fraudulently conspired together to defeat *Avery's* rights, or to shew moral fraud; but it is enough to prove that what was done was in fraud of his rights. The grant was invalid in point of law. *Avery's* object was to obtain benefits in this country, but his agent had acted in such a way as to leave the patent open to attack; it not having been granted to the true inventor, and that is sufficient cause for a revocation.

[STIRLING, J.:—There is no allegation or proof that *Avery* was the first and true inventor. He has refrained from stating that he was so in *America.*]

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(1) 3 Ex. D. 203.

(2) 2 Jur. (N.S.) 1083.

(3) 10 L. T. (N.S.) 177.

He asks by his petition for a declaration that he was; and the petition shews that that is what he claims to be. His object is to apply for a new grant under sub-sect. 8 of sect. 26, and that he can do only after a declaration of revocation on the ground of fraud. The statute did not state in fraud of the person, but "in fraud of his rights;" that does not imply fraud in the ordinary or offensive sense, but simply that the Crown was deceived in making the grant; that is, was induced to comply with the petition upon a representation which was not true.

[STIRLING, J.:—Has there been a case in which a person obtaining a grant of letters patent as upon a communication from abroad, but stating that the applicant was the true and first inventor, has been held to have deceived the Crown?]

That has been always so considered since the decision in *Milligan* v. *Marsh* (1). It is submitted that the applicant for the grant technically defrauded the Crown, though it is not necessary to shew more than that the Crown was deceived as to the rights of *Avery* as the first and true inventor; and as there has been within the meaning of the statute a "fraud of his rights," he is entitled to the declaration prayed for. [They also referred to *The King* v. *Mussary* (2), and *Hindmarch* on Patents (3).]

Pochin appeared for Respondents and for the *Avery Gas Company*, and supported the petition. He referred to *Losh* v. *Hague* (4); and *Hindmarch* on Patents (5).

Hastings, Q.C., and *Yate Lee*, for the Respondents *Lindsay* and *Weeks*:—

The case of the Petitioner must fail unless he can prove that obtaining the grant was wilfully done in fraud of his rights; that a moral fraud was committed. The Act does not say fraud upon the Crown, but upon the person who comes within the clause (*c*). It must be personal fraud, or clause (*d*) would not be necessary. "Fraud" in the statute must be construed in its

(1) 2 Jur. (N.S.) 1083.
(2) 1 Webs. Pat. Cas. 41.
(3) Page 40.
(4) 1 Webs. Pat. Cas. 203.
(5) Page 24.

plain and ordinary sense. There is no evidence to shew that moral fraud was committed. It was contended that the application for a grant should have shewn that the invention was communicated from abroad, but it has not been proved that that was not done, nor that it had been communicated in this country. *Milligan* v. *Marsh* (1) is not applicable as there was no decision—only a *dictum*, and the question as to the proper mode of obtaining a grant for an invention communicated from abroad was not argued. This was not in fact a communicated invention; but it was practically a new one, and *Lindsay* came as the first and true inventor within the provisions of 21 Jac. 1, c. 3, as his invention was not set forth in the American grant. There is no authority besides *Milligan* v. *Marsh*, but the case of *In re Wirth's Patent* (2) shews what the Court will do in the case of an alien. *Renard* v. *Levinstein* (3) is not an authority which can be relied upon. It was a case where there had been a foreign grant for an invention, and the Court of Appeal considered that the English grant should have been indentified with it in some way.

[STIRLING, J.:—The Lord Justice *Knight Bruce* seems to have had in his mind sect. 25 of the Act of 1852 (15 & 16 Vict. c. 83), which provides that a grant of letters patent in the *United Kingdom* for patented foreign inventions is not to continue in force after the expiration of the foreign patent.]

That enactment is now repealed. At any rate there is no proof that *Lindsay* did not import this invention. If he did it cannot be said that the grant to him was bad; on the contrary it should be held that it was good, and that the petition must be dismissed with costs.

Oswald, in reply.

1887. Feb. 23. STIRLING, J. (after stating the object of the petition, and referring to provisions of the *Patents, Designs, and Trade Marks Act*, 1883, and to the material paragraphs of the petition, continued):—

It is to be observed that under sect. 26 of the statute it is not open to every person to present a petition for the purpose of obtaining a revocation of a grant of letters patent, but that the right to do so is confined to certain specified classes of persons. The first question for consideration is, whether the Petitioner has brought himself within any of these classes. The averments in the petition shew that the Petitioner intended to bring himself within clause (*c*) as being a person who alleges that a grant of letters patent has been obtained in fraud of his rights. It was stated in the course of the argument that the true object in presenting the petition was to enable the Petitioner to take proceedings before the Comptroller under sub-sect. 8 of sect. 26, and that that can only be done when, in the terms of the statute, the grant is revoked on the ground of fraud. At first I thought that the Petitioner might claim under sub-sect. 4, clause (*d*), and that the omission to state that he was the true inventor was a slip, but I have come to the conclusion, having regard to the statements made, that the petition was deliberately and of set purpose framed as it is. The facts are that on the 20th of January, 1885, the Petitioner, who described himself as of *Washington*, in *Columbia*, in the *United States of America*, appointed *B. F. Weeks*, a Respondent, his attorney, under a power which he duly executed. [His Lordship read the terms of the power, and continued:—] On the same 20th of January, and contemporaneously with the power of attorney, an agreement was entered into between the parties named. [His Lordship read the agreement, and continued:—] Thus the four persons, *Avery*, the Petitioner, and *Weeks*, *Lindsay*, and *Brewster*, Respondents, were beneficially interested in the grant of letters patent which it was proposed to obtain. [His Lordship then referred to the affidavit made by *Lindsay*, and continued:—] It appears therefore that on the 17th of April, 1885, *Weeks* appointed *Lindsay* to be his substitute as the attorney of *Avery* under a power for that purpose contained in the original power of attorney. *Lindsay* made an application for a grant of letters patent in his own name, and made a statutory declaration in the form A contained in the first schedule to the Act. [His Lordship read the form of declaration and continued:—] The letters patent which were granted to *Lindsay* in his own name were not expressed as upon a communication from abroad, and the improvement referred to in paragraph 5 of *Lindsay's* affidavit was not distinguished from the rest of the invention. The rules which have been framed by the Board of Trade under the power conferred upon them by sect. 101 of the statute contain provisions which the statute itself does not contain, in reference to an application for a grant for an invention which has been communicated from abroad. Rule 27 provides that the application for such a grant shall be in the form A in the 2nd Schedule, and that form is different from that which is prescribed by the statute and from the terms in which *Lindsay* made the application. [His Lordship read the form, and continued:—] That form has been framed so as to fit in with sect. 5, sub-sect. 2, of the statute, which enacts that "An application must contain a declaration . . . that the applicant is in possession of an invention, whereof he . . . claims to be the true and first inventor." That form has not been followed in this case. There is no decision that a patent taken out as for an original invention, when in fact the invention patented was communicated from abroad, is void, though there is in the case of *Milligan* v. *Marsh* (1) what appears to be a *dictum* of Vice-Chancellor Sir *W. Page Wood* to that effect. Nor is there any decision that where an invention is partly original and partly communicated from abroad, the part communicated from abroad ought to be distinguished in the specification; but in the case of *Renard* v. *Levinstein* (2), the Lord Justice *Knight Bruce* expressed great doubt upon the point. It was said that the patentee, *Lindsay*, has been guilty of a breach of duty in obtaining the grant in his own name, and that he ought to have taken the patent out in the name of *Avery* under the power of attorney. It was further said that the rules framed by the Board of Trade have been disregarded; that the statement made in the statutory declaration that *Lindsay*, the patentee, was the true and first inventor, was false; and further, that it was so recklessly untrue, having regard to the rules, and the well-established practice in making applications for patents, as to be evidence of fraud. There is this, however, to be said on the other side. The form of application for a patent for an original invention prescribed by the Act draws no distinction between an

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(1) 2 Jur. (N.S.) 1083.

(2) 12 Ch. D. 303.

(3) 10 L. T. (N.S.) 177.

(1) 2 Jur. (N.S.) 1083.

(2) 10 L. T. (N.S.) 177.

original invention and one communicated from abroad, and it appears to be clear law that he who imports a novel invention into this country is the true and first inventor within the meaning of the statute of 21 Jac. 1, referred to in sect. 46 of the Act of 1883.

It may be useful on this point to refer to what was laid down most forcibly by the late Master of the Rolls, Sir *George Jessel*, in the case of *Plimpton* v. *Malcolmson* (1), where (2) he said: "The Act of Parliament (21 Jac. 1, c. 3), on which all these patents are founded, tells us this: that to come within the exception of the *Statute of Monopolies*, a man who has the patent must be the first and true inventor, and he must describe something in his specification which is not already known and used. What is the meaning of a first and true inventor? To ascertain its meaning, you must have recourse, no doubt, to various decisions given on the statute, which is very nearly 300 years old. It is not for a Judge of the present day to give his meaning as to what should be attributed to the words of the statute. He must take the construction put on the statute to be of the same effect, as guiding him to a correct decision, as if that construction had been enacted as part of the statute." He also said: "As I understand, shortly after the passing of the statute, the question arose whether a man could be called a first and true inventor who, in the popular sense, had never invented anything, but who, having learned abroad . . . that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided, and now, therefore, is the legal sense and meaning of the statute, that he was a first and true inventor within the statute, if the invention, being in other respects novel and useful, was not previously known in this country—'known' being used in that particular sense, as being part of what had been called the common or public knowledge of the country." There is another case, that of *Nickels* v. *Ross* (3), which was an action for the infringement of a patent. The declaration alleged that the Plaintiff was the inventor, and the defendant pleaded that before the granting of the patent the plaintiff represented to Her Majesty that, in consequence of a communication made to him by a certain foreigner residing abroad, he was in possession of an invention; that Her Majesty believing, and confiding in the truth of, and acting upon the suggestion so made by the plaintiff, and in consideration thereof, granted the letters patent, and that such representation was false, whereby the letters patent were null and void. It may be observed that the specification stated that the invention was the result of a communication made to the plaintiff by a foreigner residing abroad, and it appears to have been argued that the record shewed that the representation was false. No evidence was put forward. The Court overruled the objection, and the judgment was in these terms:—"As to the third issue—namely, that the plaintiff obtained the patent by means of a false representation to Her Majesty—the Court is of opinion that it was for the defendant to prove the affirmative, and that the record did not (as was contended in argument) shew the falsehood of his representation—a party having received information from abroad, being an inventor within the meaning of the statute 21 Jac. 1, c. 3, s. 6. Upon this issue, therefore, the plaintiff is entitled to have the verdict entered in his favour."

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(1) 3 Ch. D. 531.

(2) 3 Ch. D. 555.

(3) 8 C. B. 679, 723.

That being so, notwithstanding that the invention was founded on a communication received from abroad, it appears to me that it well might be held that the statutory declaration made by the applicant was true in point of law; and, notwithstanding the *dicta* to which I have referred, it appears to me perfectly possible that an experienced patent agent, having a competent knowledge of the law, might honestly arrive at an opinion not in accordance with those which appear to have been expressed by the two very eminent Judges whom I have named, and that such patent agent might honestly advise his client, in accordance with that opinion, to take out the patent in his own name, and that the client might honestly act on such opinion and advice without rendering himself liable to the charge of recklessness. I do not think it necessary to decide whether a patent honestly obtained under such circumstances is or is not void. As I have said, in law the statutory declaration appears to be true, and as to the disregard of the

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rules framed by the Board of Trade, the case may be governed by the maxim, "*fieri non debuit, factum valet.*" I shall, therefore, assume, though I do not decide, in accordance with the Petitioner's contention, that the patent is bad.

The question still remains, was it, in the language of the statute, "obtained in fraud of the rights" of the Petitioner? The first point to be determined in answering that question is the sense in which the word "fraud" is used in the statute. I have not to deal with a statute nearly 300 years old, like the *Statute of Monopolies* of *James* I., nor with one in which there is any context to fix the sense in which the word is used. It would be wrong, in my judgment, to construe such a word in an Act passed little more than three years ago, and in the absence of a context imperatively demanding such a construction, otherwise than in accordance with the ordinary meaning of the English language, and, consequently, as involving dishonesty or grave moral culpability on the part of the person obtaining the patent. The question then is, Has the Petitioner proved that the patentee was guilty of any such dishonest or culpable acts? The patentee has sworn that he acted in accordance with the written opinion of the patent agent. The agent has not given evidence. The evidence has been taken by affidavit, and there may have been reasons why the agent should abstain from coming forward and making an affidavit. The written opinion was not produced, but it was sworn and not denied that it was produced to the solicitor for the Petitioner and to Mr. *Gregory*, and that they expressed themselves satisfied with it; and in my opinion, as I have said, it was one which might honestly be given by an experienced patent agent. The patentee has stated, in paragraph 12 of his affidavit, as follows:—[His Lordship read the paragraph set forth above, and continued:—] These statements are borne out by the documents which are in evidence. In truth it was not until the Petitioner ascertained, as he supposed, that the requirements of English law had not been complied with, and that the patent might be invalid, that he began to charge the patentee with fraud. In my judgment the patentee has not been guilty of fraud, but at the very worst has committed an honest blunder.

The provisions of the statute of 1883 relating to fraud do not,

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in my judgment, apply to such a case. It may be that the consequences of the blunder are not less than those of fraud; but I do not think it would be right, in order to remedy a blunder, to construe the Act of Parliament which deals with fraud otherwise than in accordance with the ordinary meaning of the word.

I think therefore that the Petitioner has failed to make out his case that the patent was obtained in fraud of his rights, and that the petition must be dismissed. At the same time it occurs to me that it is possible the Petitioner may hereafter desire to present a petition founded upon clause (*d*) of sub-sect. 4 of sect. 26 of the statute, and I think that the dismissal should be without prejudice to his right so to do. The order will be that the Court being of opinion (following the words of the statute), that the patent has not been obtained in fraud of the rights of the Petitioner, makes no order other than that the Petitioner do pay the costs of the Respondents *Weeks* and *Lindsay*; and that the order is to be without prejudice to any petition which the Petitioner may be advised to present for revocation of the patent, as a person alleging that he was the true inventor of any of the inventions included in the claim of the patentee.

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C. A.

From this decision the Petitioner appealed. The appeal came on for hearing on the 15th of July, 1887.

Oswald, and *R. W. Wallace*, for the Appellant:—

The patent was taken out in fraud of the rights of *Avery*. It is not necessary to shew that there was moral culpability or an intention on the part of *Lindsay* to obtain the sole benefit of the patent. It is fraud in the eye of the law if an agent deals with the property of his principal in such a way as to injure the property or endanger its existence: *Harman* v. *Fishar* (1); *Peek* v. *Gurney* (2); *Burrowes* v. *Lock* (3); *Tate* v. *Williamson* (4). *Lindsay's* conduct in taking out the patent in his own name rendered the patent void on several grounds. The statement that he was the true and first inventor was not true. It is the universal practice if an invention is communicated from abroad to state it in the

(1) Lofft. 472.
(2) Law Rep. 13 Eq. 79, 113; 6 H. L. 377.
(3) 10 Ves. 470, 475.
(4) Law Rep. 2 Ch. 55.

specification. Where a man goes abroad and learns an invention and imports it himself into this country, he may take out a patent for it in his own name, as a reward for his trouble: but if it is communicated to him while in this country from abroad, either by letter or by some person in this country as the agent of a foreign inventor, the invention must be stated to be communicated from abroad. In the present case *Lindsay* ought not to have taken it out at all: it should have been taken out by *Weeks* as importer, or by *Avery* in his own name: *In re Wirth's Patent* (1). By taking it out as he has done, *Lindsay* has deceived the Crown: *Milligan* v. *Marsh* (2); *Steedman* v. *Marsh* (3); *Hindmarch* on Patents (4); *Marsden* v. *Saville Street Foundry Company* (5).

[COTTON, L.J.:—If there has been a fraud on the Crown, how does that shew that there has been a fraud on your rights?]

The fact of the misstatement invalidates the patent, and so our rights are prejudiced.

[BOWEN, L.J., referred to *Beard* v. *Egerton* (6).]

That case is not really against us. Where material information is concealed from the Crown whether intentionally or not, the patent is void. The patent is also fraudulent as against *Avery*, because the improvement made by *Lindsay* is not distinguished from the rest of the invention: *Renard* v. *Levinstein* (7). We are also entitled to a revocation of the patent under clause (*d*), on the ground that *Avery* is the first and true inventor. There are sufficient allegations in the petition to support our claim for relief under that clause. It is for the benefit of all parties that the validity of the patent should be now decided.

Hastings, Q.C., and *Yate Lee*, for the Respondents *Lindsay* and *Weeks*, were not called on.

Pochin, for the Respondents *Brewster* and the *Avery Gas Company*.

(1) 12 Ch. D. 303.
(2) 2 Jur. (N.S.) 1083.
(3) Ibid. 391.
(4) Page 40.
(5) 3 Ex. D. 203.
(6) 3 C. B. 97.
(7) 10 L. T. (N.S.) 177.

COTTON, L.J., asked whether the Respondents consented that in case a fresh petition was presented, as mentioned in Mr. Justice *Stirling's* order, either party should be at liberty to read the evidence filed on the present petition, subject to just exceptions, and subject to the right of cross-examination.

The counsel for the Respondents consented to this arrangement.

COTTON, L.J.:—

This is an appeal from an order made by Mr. Justice *Stirling*, who dismissed the petition presented to revoke letters patent which had been granted to a Mr. *Lindsay*, and gave liberty to the Petitioner to present a new petition on the ground of his being the person who was the first and true inventor. There is no appeal against that liberty so given; but we think (and Mr. *Graham Hastings* does not object to that) that, to save the expense which would otherwise be caused on presenting a new petition by the affidavits filed on this petition not being capable of being used on such new petition, there should be added to that liberty, that either party is to be at liberty to use, if any new petition is presented under the leave granted, any of the evidence which has been filed on the present petition, subject, of course, to all just exceptions which may be raised by any person against whom the evidence is used; and subject also to the right of either party to demand cross-examination of the deponents who have made affidavits. That should be added to the order, so that there may be no doubt of it hereafter, because, when a different question is raised, different considerations may, of course, arise as to whether a cross-examination is desirable, and this will give both parties that opportunity.

Then, was the order right? In my opinion it was. The petition is presented really under clause (*c*) of the 4th sub-section of sect. 26, which is as follows:—"Any person alleging that the patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims," may present such a petition; and if it is made out that the present Petitioner, *Avery*, is a person who brings himself within that clause, and satisfies the

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Court that the patent was obtained in fraud of his rights, then we should have to go into the other question, namely, whether the patent is or is not good; but if the petitioner has no *locus standi*—if he is not one of the persons who is entitled under the Act to present a petition to revoke the letters patent, in my opinion we have not to go into the question which was so much argued as to whether this patent is or is not a good patent. I may say that, having regard to sub-sect. 8 of sect. 26, which enables, in the case of a patent which has been obtained by fraud, if it is revoked on the ground of fraud, a new patent to be granted, I am satisfied, as the learned Judge was, that this petition avoided alleging that the Petitioner was the first and true inventor because his object was not to destroy the patent, but to get a new patent if he made out that it had been obtained by fraud. Therefore, in my opinion, he intended, on his petition, to confine himself, under the heading (*c*), to the case that the patent had been obtained in fraud of his rights, and he has not alleged that he was the first and true inventor. It is difficult, notwithstanding the arguments which were addressed to us by the Appellant, quite to see who it is alleged ought to be considered as the first and true inventor under the circumstances of this case—whether *Avery*, or *Weeks*, or *Lindsay;* because it does not quite appear whether the information, under which the patent was obtained, was communicated to *Weeks*, or whether it was communicated to *Lindsay*, we not having the correspondence which took place between the parties till August, 1886.

The question is, has this patent been obtained in fraud of the rights of Mr. *Avery?* I think it is clear on the evidence that he had obtained either for his own invention or not (that is immaterial) a patent in the *United States*, or was going to obtain a patent in the *United States*. Then he entered into an arrangement with *Weeks*, under which *Weeks* was appointed his agent, with power to appoint a substitute in order to obtain letters patent, for that for which letters patent were going to be obtained in the *United States*, in *England* and in other countries on the continent. Then there was an agreement entered into between the petitioner and *Weeks*, by which *Avery* and *Weeks* and two other persons, one of whom was *Lindsay*, were to be jointly interested in these patents when they were obtained. Then *Weeks* came to *England*, and, for reasons into which we need not enter, he substituted *Lindsay* to act in obtaining the letters patent here. *Lindsay* was advised by a patent agent that it would be advisable that he should obtain the patent in his own name, and then he made a declaration that he was the first and true inventor, and thus got the patent in his own name. I do not enter into the question whether that patent was good or not, on the grounds which have been urged for making it out a bad patent. I intimate no opinion that it was bad in any way; but was the patent so obtained under these circumstances obtained in fraud of the rights of *Avery?* There is no evidence which satisfies me that *Lindsay* ever intended to deprive *Avery* of any of the rights which he would have had under that agreement which, as I have said before, had been entered into. There is everything to the contrary. In every document which has been brought before us, *Lindsay*, and those who are acting with him, recognise him as acting for *Avery* and those who are interested under the agreement which I have mentioned. If *Lindsay*, having obtained the patent in his own name, had sought, by means of that, to deprive *Avery* of any rights which he would have had if the patent had been in his own name, then the case would have stood very differently; but, in my opinion, if he made a mistake—I do not say that he did—but if he made a mistake honestly, that, in my opinion, although it might make the patent bad, would not enable the Petitioner to establish that the patent was obtained in fraud of his rights. In my opinion, that means obtained in violation of the rights of *Avery*, who was entitled, I will assume, to have a patent for this as the true inventor, and obtained so as directly or indirectly to deprive him of his rights, and to gain some advantage to himself. An honest mistake by an agent, even though that may cause loss to the principal, is not, in my opinion, an act done in fraud of the rights of the principal. It is an act done which injures the rights of the principal, but an act done in fraud of his rights is, to my mind, an entirely different thing. To be in fraud of his rights it must be either done with the intention of depriving the principal of his rights, or must be insisted upon so as to deprive the principal of his rights. There was an argument addressed to

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us with great zeal, that anything which deprives a person of his rights, if done by one in a confidential position, such as an agent is, is done in fraud of the rights of the principal. That, in my opinion, is a misuse of the term "fraud." It may be a mistake for which the agent may be answerable for not having performed his duty. It may be a mistake for which he may not be answerable, but which still may cause great loss to his principal; but an act to be in "fraud of his rights," to my mind, must involve an attempt by the agent to deprive the principal of something, or to gain for himself something at the expense of his principal; and, in my opinion, on the evidence here—I will not go through it in detail—there is nothing which can justify us in coming to any other conclusion than this, that if, in fact, *Lindsay* did act under a mistake, or was wrongly advised, he did so by an innocent mistake, and not as acting in fraud of the rights of his principal. In my opinion, therefore, the case which is raised by this petition fails, and Mr. Justice *Stirling* was right in dismissing the petition with costs.

BOWEN, L.J.:—

I am of the same opinion. The simple question which we have to determine is this, whether the patent obtained in the name of *Lindsay* was obtained in fraud of the rights of *Avery*. We were asked to hold that every mistake which is made by an agent which may operate, or does operate, to the detriment of his principal is an act done in fraud of the rights of the principal. There can be no possible basis for such a contention. It is founded on a misconception of the remedies and relief which equity constantly affords in fit cases where persons are not allowed to take advantage of mistakes, even though they are *bonâ fide*, or misrepresentations which they have made *bonâ fide*. But although equity in such cases gives the same relief as if the mistake or misrepresentation had been fraudulently made, it does not follow that what is honest is fraudulent, and it would be monstrous to apply such reasoning to the clear words of the statute. We were asked afterwards to deal with this matter as if the case had been launched and the appeal pursued, not upon the basis of heading (*c*) of sub-sect. 4, which deals with patents

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obtained in fraud of the rights of another, but as if it also was based upon an allegation that somebody, not being the Petitioner, was the true inventor of the invention. That case was not made by the petition when it was first presented by Mr. *Kimber;* it was not made by the petition as amended when Mr. *Avery's* name was joined, and I think that case was intentionally not made. If it had been made, the relief which alone is granted where a patent is revoked on the ground of fraud, would not be open to the Petitioner; that is to say, although he might have succeeded in such a case, had he made it, in setting aside the patent, he could not have obtained a fresh patent for himself because, in order to do that, he must prove fraud, and prove it within the meaning of the statute. Therefore I agree entirely with what the Lord Justice said, and what Mr. Justice *Stirling* said, that this petition was deliberately based on and confined to the allegation that there had been a fraud on the rights of *Avery.* There was no fraud at all on *Avery's* rights. But are we now to allow the Petitioner to change his ground, and to amend his petition so as to bring it within clause (*d*), and to ask that therefore a declaration should be made that he is the true inventor. It seems to me that we should be doing no real good to the parties and saving no expense if we were to allow such an amendment at the present moment. Mr. *Graham Hastings'* client would, for anything I know, desire to stand aloof altogether from such a petition and not appear to it, or not resist it in the first instance.

We therefore should be able only to allow the Petitioner to make such an amendment, if we did allow it, on his paying all the expenses which have been incurred by the other side; and, on the other hand, if Mr. *Graham Hastings'* client did wish to oppose such a petition he would like naturally to re-mould his affidavits, or to file affidavits with reference to the early correspondence between *Lindsay* and *Avery,* which we have not got before us, and indeed to make an entirely new case. Therefore again we could only allow such a burden to be imposed upon Mr. *Graham Hastings'* client on condition of the prior payment of all the costs thrown away by the Petitioner in framing his case under clause (*c*), and not under clause (*d*). Now it seems to me that no additional costs can be incurred by our refusing leave to amend. The Petitioner, if so advised—I do not encourage the presentation of it in any way—may present a fresh petition, and, as Mr. *Graham Hastings* consents that all the affidavits may be used again, subject to just exceptions and subject to the right of cross-examination, so far as the costs are concerned, the Petitioner would be in no worse position than if we allowed the amendment, whereas I think that a petition properly framed would give the parties not only an opportunity of considering their position, but prevent the embarrassment and the entanglement of such a case as would then be made with the case as made under the present petition. I think therefore that we are acting in no way contrary to the usual course of the Court in being extremely indulgent, upon proper terms, in the direction of allowing amendments, if we refuse it in the present case, giving the Petitioner, if he chooses to reconsider his case and to frame a new one, the advantage which would be given to him.

Fry, L.J.:—

I am entirely of the same opinion. One of the persons who, by the statute of 1883, is permitted to present such a petition as the present is a person alleging that the patent was obtained in fraud of his rights. In my view, that means alleging that the patent was obtained in derogation of the rights of the Petitioner and by fraud; and the Petitioner himself took that view of the meaning of the statute, because his petition contains this allegation: "Instead of obtaining letters patent for and on behalf of your Petitioner *Avery*, on a communication from abroad, *Weeks* conspired with *Lindsay* to wrongfully and by fraud obtain from the Crown the grant of letters patent." I think therefore that the case which the Petitioner came here to try was, as I think the statute required it to be, a case of fraud against the Respondent *Lindsay*. I desire to state in the broadest terms that, in my judgment, no fraud whatever has been shewn to have been committed by the Respondent *Lindsay*. As far as I can see, his conduct throughout has been that of a perfectly honest man. The terms in which the prospectuses were settled, the terms in which the correspondence was carried on on both sides, convince me that the Respondent never intended for one moment to set up any claim inconsistent with that of Mr. *Avery*, and I can see no ground whatever for supposing that he desired to avail himself of any technical right arising from the form in which the letters patent were applied for. The only point which weighed with me at all during the course of the discussion was this. It was said that the Respondent *Lindsay* had set up the fact that he had invented a portion of the subject-matter of the letters patent as a ground for claiming the invention as his own property. That suggestion appears to me to be entirely unfounded, for the only way in which the Respondent referred to that fact was to explain the advice which had been given to him by the patent agent. It appears to me that there was no fraud whatever on the part of the Respondent. Then it has been urged on us that we ought to allow an amendment, that we ought to allow the Petitioner to suggest that he is the true inventor of the invention intended to be claimed by the patent. I confess I do not know, after listening to the argument of the learned counsel for the Appellant, who, according to their contention, is the first and true inventor. It appears to me that one of the learned counsel suggested that in the view of the law *Avery* was the first and true inventor; and that the other learned counsel suggested that *Weeks* was the first and true inventor. But certain it is to my mind that the point was never intended to be raised by the petition, and that it is not raised by the petition. It was only raised at the last moment in the hope of saving costs.

Mr. Justice *Stirling* has given the Appellant the full measure of what he was entitled to. In addition we have, without opposition on the part of the Respondents, allowed a further petition to be presented if the Petitioner be so advised. I do not encourage the presentation of any such petition. I do not desire to express an opinion as to whether there has been any mistake, or as to whether the patent is or is not a good one. I think both those questions deserve full consideration before the Petitioner takes further proceedings.

Solicitor for the Petitioner and *Brewster* and the *Avery Gas Company*: *E. Kimber*.

Solicitors for the other Respondents: *Neish & Howell.*

M. W.

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KAY, J.
March 12, 19, 26, 30.
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June 9; *July* 25, 26.

Company—Winding-up Order—Prescriptive Corporation—Trust for Benefit of individual Members—Fishery—Right of dredging Oysters—Discretion of Court—Companies Act, 1862, *s.* 199 [*Revised Ed. Statutes, vol. xiv., p.* 247.]

A company or fraternity of free fishermen existed from time immemorial within the manor of *F.*, all the members of which were admitted tenants of the manor, and took an oath of homage to the lord. No grant to the company as a corporation was in existence, but from numerous ancient documents it appeared that the company had the exclusive right of dredging for oysters and taking other kinds of fish within the manor, for which it paid a rent of £1 3*s.* 4*d.* to the lord. By an Act passed in 1840 it was recognised as a company in the nature of a prescriptive corporation, and it was recited that the members had time out of mind dredged oysters exclusive of all other persons, and that the fishery was of great benefit to the public; it was thereby enacted that the company might exercise all the powers then vested in it, and fresh powers of raising money and charging the profits of the fishery by way of mortgage were given it, the form of mortgage containing no power of sale. Rules were laid down for the management of the company, but it was provided that nothing in the Act should be construed to incorporate the company. The company made by-laws for the regulation of the dredging of oysters, and, subject to these by-laws, the privilege of dredging and fishing was enjoyed by the members for their own benefit.

A petition having been brought by a creditor for winding up the company:—

Held, that the company was a corporation in which the exclusive right of fishing within the manor was vested; but that the corporation held the right on a condition or trust for the individual members; and that if the company was wound up this right of fishing could not be sold by the liquidator, and therefore the winding-up order would be useless.

The Court accordingly refused to make any order for winding up.

Order of *Kay*, J. reversed.

THIS was a petition to wind up a company or association known by the name of "*The Company or Fraternity of Free Fishermen and Dredgermen of the Manor and Hundred of Faversham, in the County of Kent.*"

The association had existed from time immemorial, and its early history was very obscure.

It appeared from documents in the Record Office that the manor of *Faversham* was granted by King *Stephen* to the Abbot

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and monks of the *Abbey of Faversham* on the occasion of the foundation of the abbey by that monarch, together with all woods, pastures, and waters thereto appertaining. The charter was confirmed by *Henry* II., *John*, and *Henry* III.

On the dissolution of the monasteries by *Henry* VIII. the manor became vested in the Crown.

No record had been found of any charter or grant of the fishery to the tenants of the manor or any association of fishermen, but the fishermen of *Faversham* appear from time immemorial to have paid a yearly rent of £1 3*s.* 4*d.* to the lords of the manor for the right of fishing.

In the certificate of the Commissioners appointed by Queen *Elizabeth* in the year 1591, the Commissioners report that "the fishermen of *Faversham* being admitted at Her Majesty's Court of Admiralty yearly holden within Her Majesty's manor of *Faversham*, have been time out of mind used, without let or interruption of any others, to fish and dredge, they paying Her Majesty, her heirs and successors, one yearly rent of 23 shillings and 4 pence."

The manor remained vested in the Crown till the fifth year of *Charles* I., when it was granted to Sir *Edward Hales*, and in the grant was included all the rent of 23 shillings and 4 pence yearly issuing and payable from the seven weirs called *South Weirs*, within the manor or hundred aforesaid, held at the will of the lord, and the services therefrom due and belonging, and also the rent of 23 shillings and 4 pence yearly issuing and payable from the fishing in the sea within the liberty of the Admiralty formerly appertaining to the *Monastery of Faversham.*

By a decree of the Court of Admiralty in 1655 the tenants and fishermen of the manor and hundred of *Faversham*, and every one of them, were adjudged to have full right to dredge on *Harty* shore and other places therein named for oysters, exclusive of the fishermen of *Milton*, *Stroud*, and all others whatsoever. The bounds of the *Faversham* fishing grounds were settled by a decree of the Court of Chancery in 1735, when they were stated to adjoin the fishery of *Sea Salter*.

A bill in the Court of Exchequer in the early part of the last century was also put in evidence by the Respondents, in which statements were made asserting the right of the free fishermen of *Faversham* to dredge for oysters within the boundaries of the fishery.

By an Act passed in the year 1840, the 3 Vict. c. lix., intituled "An Act for granting certain powers to the *Faversham Oyster Fishery Company*," it was recited that "there is and from time out of mind hath been a certain company in the nature of a prescriptive corporation called or known by the name of '*The Company or Fraternity of Free Fishermen and Dredgermen of the Manor and Hundred of Faversham in the County of Kent*,' and the freemen and members of the said company have bred, laid, dredged for, caught, had and taken oysters and oyster-brood in the waters and creeks within the said fishery exclusive of all other persons, the said company paying in consideration thereof a yearly sum of 23 shillings and 4 pence to the lord of the said manor and hundred of *Faversham* for the time being;" and further, that "the said fishery is maintained and preserved at a very considerable yearly sum of money by the said company, and the said fishery is of great benefit to the public as well as to the said company; and it is expedient that further powers should be granted to the said company to maintain and preserve the same than they now possess"—and it was enacted that the company and all other persons who should thereafter be free of the said fishery should and might have and exercise all the powers and authorities then vested in and belonging to and then used and exercised by the said company, and also should have and exercise all such other powers and authorities as were thereafter given. The Act then provided for the meeting of the annual and other general courts, at which the steward of the manor and hundred presided, and the election out of the members of the officers of the company and twelve jurymen, and provided that the company might sue and be sued in the name of any of its officers; and that the names of members and the proceedings at the meetings should be entered in a book to be kept by the steward of the manor. And it was further enacted that for raising money to defray the expenses of obtaining and passing the Act and of managing and carrying on maintaining and preserving the said fishery it should be lawful for the company to borrow money, and

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to mortgage, assign, or charge the said fishery and the profits arising therefrom, and the oysters, brood, and stock thereon or therein as a security for the money so borrowed with interest, such mortgages, assignments, and charges to be under the hands and seals of the officers for the time being of the company and in the form given in the Act.

By this form the officers of the company were expressed to assign the said fishery and the oysters, brood, and stock therein or thereon, and the profits arising therefrom to the mortgagee, his executors, administrators, and assigns, until the sum of money so borrowed and all interest thereon should be fully paid and satisfied.

No power of sale was given by the Act or in the form of mortgage: but it was enacted that if the interest was in arrear the mortgagee might apply to two justices of the peace of the county and they might appoint a receiver of the profits of the fishery until the interest in arrear had been satisfied.

The Act contained a special proviso that nothing therein contained should extend or be construed to extend to incorporate the said company or to relieve or discharge the company or the members thereof from any responsibility, contracts, duties, or obligations to which they were then or might thereafter become subject.

The freemen or members of the company were elected at the general meetings, each paying an admission fee of £3 3*s.* 6*d.*, but being called on for no further payments. All members were admitted tenants of the manor, and took an oath of homage to the lord; and none were eligible who had not served an apprenticeship to one of the members for seven years; and all members on their election were obliged to be married. Each member was paid for his work, which was allotted to him by the officers of the company, and the produce of the oyster fishery was received by the treasurer and sold by him and the proceeds divided among the members. The number of members at the present time was about 180. The members were subject to no rules as to fishing for any kinds of fish except oysters.

Catharine Brighting was a creditor of the company, who had brought an action against it and obtained judgment for £529

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for her debt and costs. The money not having been paid she filed a petition to wind up the company.

From the evidence it appeared that ever since the year 1715, in order to meet the increasing demand for native oysters, the company had from time to time borrowed money for the purpose of buying brood and laying it on the grounds of the company, and had from time to time repaid such moneys, and that in this way the company had often been more or less in debt since that date: that in 1840, when the above-mentioned Act of that year was passed, the value of the fishery was estimated at £40,000: that in 1861 the company owed £32,000, but that favourable seasons enabled them to reduce the debt to about £7000 or £8000, at about which amount it stood at the present time, though it was anticipated that, if the forthcoming season should prove favourable, the company would have no difficulty in borrowing money on their stock to an amount more than sufficient to pay all their debts. It was also urged that the company could not be said to be insolvent as their fishery and rights were worth considerably more than their indebtedness.

The petition came on for hearing before Mr. Justice *Kay* on the 12th of March, 1887.

Ince, Q.C., and *F. B. Palmer*, for the Petitioner, contended that this was an "unregistered company" which could be wound up under sect. 199 of the *Companies Act*, 1862; and they cited *Lindley* on Partnership (1); *Willingale* v. *Maitland* (2); *Com.* Dig. "Piscary" (3); *Le Case del Royall Piscarie de le Banne* (4); *In re Bradford Navigation Company* (5); *In re Wey and Arun Junction Canal Company* (6); *In re Basingstoke Canal Company* (7); *In re Brentford and Isleworth Tramways Company* (8); *In re Haytor Granite Company* (9); *In re Isle of Wight Ferry Company* (10); *In re Electric Telegraph of Ireland* (11); *In re Oriental Bank Corporation* (12); *Re Royal Victoria Palace Theatre Syn-*

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(1) 4th Ed. vol. i. p. 5.

(2) Law Rep. 3 Eq. 103, 109.

(3) Vol. v. p. 362.

(4) Davis, 55.

(5) Law Rep. 10 Eq. 331; 5 Ch. 600.

(6) Law Rep. 4 Eq. 197.

(7) 14 W. R. 956.

(8) 26 Ch. D. 527.

(9) Law Rep. 1 Ch. 77.

(10) 2 H. & M. 597.

(11) 22 Beav. 471.

(12) 52 L. T. (N.S.) 556.

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dicate (1); *In re Adansonia Fibre Company* (2); *Webb* v. *Whiffin* (3); *In re St. Thomas' Dock Company* (4); *Bowes* v. *Hope Life Insurance Company* (5); *Raphael* v. *Thames Valley Railway Company* (6).

Upjohn, for creditors to the amount of £7238, supported the petition.

Renshaw, Q.C., and *Stuart Sankey*, for the company, contended that the Court had no jurisdiction to order a winding-up under the *Companies Act*, 1862, and cited *Goodman* v. *Mayor of Saltash* (7); *In re Chapel House Colliery Company* (8); *Rex* v. *Pasmore* (9); *In re Brighton Hotel Company* (10); *In re Exmouth Docks Company* (11); *In re St. James's Club* (12).

Stock, for creditors to the amount of about £2400, also opposed the petition.

Ince, in reply, cited *Holford* v. *Bailey* (13); *Co. Litt.* (14); *Marshall* v. *Ulleswater Steam Navigation Company* (15).

1887. March 30. KAY, J.:—

A creditor who has obtained judgment against this company for £529 has presented this winding-up petition. It is resisted by the company on two grounds—one that this is not such a company as can be wound up; and secondly, that, if it were, the Court has a discretion which should be exercised either by refusing or delaying the order. [His Lordship then stated the facts of the case, and continued:—]

Upon the first question, whether or not this is an unregistered company under sect. 199 of the *Companies Act*, it is material to observe further that the evidence shews that in 1840, at the date

(1) 30 L. T. (N.S.) 3.
(2) Law Rep. 9 Ch. 635.
(3) Ibid. 5 H. L. 711.
(4) 2 Ch. D. 116.
(5) 11 H. L. C. 389.
(6) Law Rep. 2 Ch. 147.
(7) 7 App. Cas. 633.
(8) 24 Ch. D. 259.
(9) 3 T. R. 199.
(10) Law Rep. 6 Eq. 339.
(11) Ibid. 17 Eq. 181.
(12) 2 D. M. & G. 383.
(13) 8 Q. B. 1000.
(14) 4 b.
(15) 32 L. J. (Q. B.) 139.

of the Act, the value of the fishery was estimated to be £40,000 and that in 1861 the company owed £32,000, which they have since reduced to about £8000.

This, then, is an association to carry on for profit a special business of oyster-breeding and fishing. It possesses property of more or less value, and is a corporation or *quasi*-corporation with an unlimited power of borrowing and mortgaging such property. It seems probable that no means exist of making the members individually liable for the debts of the company, but the property can certainly be made liable. If the business were prosperous, and there was a clear profit after payment of liabilities, that, I presume, would be divisible amongst the members. In short, it is a trading association for the purpose of gain, and I can see no valid reason why it should not come within the powers given by sect. 199 of the *Companies Act*, 1862, and I am of opinion that there is a jurisdiction under that section to order it to be wound up.

Then, is this a case in which the Court can, or should, if it can, refuse or delay the order? Regard must be had to the wishes of the other creditors. Of the £8000 only some £2400, chiefly small creditors, oppose the application, while all the rest support it. It is said that the seasons have lately been very bad, and that if there should be within the next two months a good brood of oysters it would be possible to borrow money on mortgage and so to pay off the present creditors. On the other hand, if there should be another bad season delay might be a disadvantage to the creditors who are now pressing for the order. I do not think it is a case in which, according to the present decisions, the Court can be said to have a discretion, or, if it had, that the wishes of so large a majority of creditors can be disregarded. If so good a season should happen that the debts can be provided for, the Court, under sect. 89 of the *Companies Act*, 1862, would have power to stay the winding-up. I must make the usual winding-up order with the usual order as to costs.

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From this judgment the company appealed. The appeal came on for hearing on the 9th of June, 1887.

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In re THE COMPANY OR FRATERNITY OF FREE FISHERMEN OF FAVERSHAM.

Renshaw, Q.C., and *Stuart Sankey*, for the Appellants:—

The Court has no jurisdiction to wind up the association under the 199th section of the *Companies Act*. It is neither a corporation nor a company for purposes of gain. It is merely an association of individuals for mutual support and protection, like a trade union: *Cuddon* v. *Eastwick* (1). It is a shifting body comprising such of the copyhold tenants of the manor as are elected. It is called a *quasi*-corporation, but that is a body not known to the law; and in a private Act is described as in the nature of a prescriptive corporation; but by the same Act it is expressly provided that nothing in the Act should have the effect of incorporating the association. In the case of *Gann* v. *The Free Fishers of Whitstable* (2) the association was similar to this, but in that case the association had been specially incorporated by 33 Geo. 3, c. 42. But if it is a corporation, it is not such a corporation as the Court can wind up. It has duties to perform. These duties are for the benefit of the individual members, and the benefit of the public generally. The 3 Vict. c. lix. speaks of the fishery as being of great benefit to the public. There is no instance of such a corporation being wound up. The Court could not wind up a municipal corporation. Moreover, the company has no assets of which the liquidator could dispose. The boats belong to the individual members. The fishery and dredging rights could not be sold, they can only be used by inhabitants and tenants of the manor. In such a case the Court will not make a winding-up order which would be useless and unmeaning: *In re Chapel House Colliery Company* (3); *In re St. James's Club* (4); *In re Exmouth Docks Company* (5); *Rex* v. *Pasmore* (6); *In re Brighton Hotel Company* (7).

Stock, for creditors, who opposed the winding-up order.

Ince, Q.C., and *F. B. Palmer*, for the Petitioner:—

This company is a corporation. It may have been constituted by a charter now lost, but it has been treated as a corporation

(1) 1 Salk. 143.
(2) 11 H. L. C. 192.
(3) 24 Ch. D. 259.
(4) 2 D. M. & G. 383.
(5) Law Rep. 17 Eq. 181.
(6) 3 T. R. 199, 243.
(7) Law Rep. 6 Eq. 339.

from time immemorial. The special Act 3 Vict. c. lix. assumes throughout that it has all the qualities of a corporation. There is no separate property in the individual members, it has a corporate name and general meetings of the members, and when one of the members was injured by the action of its officers a mandamus was brought against it: *Rex* v. *Company of Fishermen of Faversham* (1). This mandamus was addressed to them as a corporation, and a return was made to the writ as a corporation. The work which the members do and the property they acquire are the work and property of the corporation. There is nothing in this corporation in the nature of a charity, although there is a charity connected with it. Again, the rent for the fishery is payable not by the free fishermen but by the company as a corporation. The fishery is vested in the company as a corporate body, and the corporators are the only persons who can exercise the right. Each member of the company pays an admission fee to the company, is paid for the work done by him, and the produce of his work is received by the treasurer, and is sold by him for the benefit of the company. This then is a corporation formed and existing for the purpose of carrying on a trade for profit, having officers who can sue and be sued on behalf of the company, so that judgments against the officer will bind the property of the company: *Willingale* v. *Maitland* (2).

Whether it is strictly a corporation or not, is not of real importance. If it is not, it is a company formed for the purpose of gain, and in either case it is capable of being wound up as an unregistered company under sect. 199 of the *Companies Act*, 1862: *Goodman* v. *Mayor of Saltash* (3); *In re Royal Victoria Palace Theatre Syndicate* (4). If it is capable of being wound up, there is no good reason why the Court should not exercise its power. The fact that public interests are involved is no objection in a case where the Petitioners are creditors of the company. It is not correct to say that the company has no property which can be sold by the liquidator. The right of fishing and dredging is a franchise and is transferable: *Malcomson* v. *O'Dea* (5); *The*

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(1) 8 T. R. 352.
(2) Law Rep. 3 Eq. 103.
(3) 7 App. Cas. 633.
(4) 30 L. T. (N.S.) 3.
(5) 10 H. L. C. 593.

Case of the Abbot of Strata Mercella (1); *Duke of Northumberland* v. *Houghton* (2); *In re Isle of Wight Ferry Company* (3); *Buckley's* Companies Acts (4); *Le Case del Royall Piscarie de le Banne* (5); *In re Bradford Navigation Company* (6); *Raphael* v. *Thames Valley Railway Company* (7); *In re Herne Bay Waterworks Company* (8); *In re Exmouth Docks Company* (9); *In re Electric Telegraph of Ireland* (10); *In re Basingstoke Canal Company* (11); *Bowes* v. *Hope Life Insurance Company* (12); *In re Wey and Arun Junction Canal Company* (13); *In re Haytor Granite Company* (14); *In re Oriental Bank Corporation* (15); *In re Western of Canada Oil, Lands, and Works Company* (16); *Ex parte Banner* (17); *Copper Miners Company* v. *Fox* (18).

Upjohn, for creditors who supported the petition.

Renshaw, in reply:—

The fact that a mandamus can be brought against the association is not a conclusive proof that it is a corporation: *Blackstone* (19). A corporation cannot hold as copyholders of a manor: *Attorney-General* v. *Lewin* (20). But if it is a corporation, it holds the fishing in trust for the members as beneficiaries. This trust cannot be sold. The Court will not make a winding-up order, even if it has the power, if the creditors can get no benefit from it. The *onus* is on the Petitioner to shew that there are assets available for the creditors.

COTTON, L.J.:—

This is an appeal against an order made for the winding-up of the *Company or Fraternity of Free Fishermen of Faversham*, and the order is made by Mr. Justice *Kay* on the petition of a creditor.

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(1) 9 Rep. 24a.
(2) Law Rep. 5 Ex. 127.
(3) 2 H. & M. 597.
(4) 4th Ed. pp. 192, 193.
(5) Davis, 55.
(6) Law Rep. 10 Eq. 331; 5 Ch. 600.
(7) Ibid. 2 Ch. 147.
(8) 10 Ch. D. 42.
(9) Law Rep. 17 Eq. 181.
(10) 22 Beav. 471.
(11) 14 W. R. 956.
(12) 11 H. L. C. 389.
(13) Law Rep. 4 Eq. 197.
(14) Ibid. 1 Ch. 77.
(15) 52 L. T. (N.S.) 556.
(16) Law Rep. 17 Eq. 1.
(17) 17 Ch. D. 480.
(18) 16 Q. B. 229.
(19) Vol. iii. p. 110.
(20) C. P. Coop. 51.

I do not go into the question whether the Petitioner is to be considered a creditor or not; she appears as a creditor, and as a general rule a creditor who is not paid is entitled to have a winding-up order as the only means of obtaining payment of his debt. But then it follows from that, that if it appears that winding-up the company or corporation will not produce the means of paying the debt of the creditor, then the Court is not bound to do a foolish thing or make a winding-up order which will produce no fruit, and which, although it would make costs, would not even provide a fund for payment of those costs. I do not agree with what Mr. *Renshaw* said, that it lies on the Petitioner to shew that the winding-up order would produce a result. *Primâ facie* if there is a company or corporation the winding-up will by sale of its property produce something which will pay or help to pay the creditors. But the question must be whether, after the case has been argued out, the Appellants have made out—for I think it is for them to make out—that no good could result in this case from making the winding-up order. In my opinion, although I regret that creditors who have advanced their money should not be paid, yet the result of the argument and evidence which we have had brought before us is this, that no good whatever would result from making a winding-up order; for this reason, that the corporation, assuming it to be a corporation, has no property which could be sold effectually.

The evidence here is not very plain, but we must try and make out, if we can, what is the true position of affairs. The matters go back to very great antiquity, and the evidence has not, as a rule, been brought before us in such a way as to enable us to decide absolutely on that evidence what the facts are. I think one thing is clearly proved, that the only property which the *Free Fishermen* have is the right to fish or dredge for oysters in the sea. Then the question is, can that be sold so as to produce any benefit for the creditors? It appears on the evidence that there were two rents of the same amount, one was a rent of £1 3*s.* 4*d.* paid for certain "weirs," which were held at the will of the lord of the manor of *Faversham.* But there was also independently of that another rent of £1 3*s.* 4*d.*, which was not paid in respect of anything held at the will of the lord, but was paid in respect of a grant which must have been by the Crown and before Magna Charta, of the right to dredge for oysters in the sea within certain limits, and that is the property of the fraternity. What has become of the seven weirs we know not. That right of fishery which is now in question is the only property which this fraternity has. In my opinion it is not material for the purpose of deciding whether there should be a winding-up to determine whether this is a corporation or not. In my opinion it is a corporation, and I say so for a reason which may be shortly expressed. There is an Act to regulate and give powers to this *Fraternity or Company of Free Fishermen* (3 Vict. c. lix.) and that recognises that there is in this body of persons property consisting of this free fishery, this right to fish for oysters. It could not be in them unless in fact they were incorporated, either for the purposes of the grant or by virtue of the grant to them from the Crown; and although a grant from anybody but the Crown would not have incorporated this company of *Free Fishermen*, yet if there was a grant from the Crown to certain persons as the *Free Fishermen of Faversham* that would incorporate them for the purpose of their being enabled to take the grant which was made to them by the Crown. In my opinion therefore this was a corporation. But that does not settle the matter at all. If this grant was to a corporation, which I think was formed for the purposes of the grant, then undoubtedly subject to the objections which have been taken to winding up a company which has such a grant made to it and selling the franchise so granted, it would be a case for selling and realizing the property of the corporation. But it may be that the corporation as such never had any beneficial interest in this franchise which was granted to it, and in my opinion that is the proper result of the evidence. What we find is this, that certain persons join this corporation, and that they must be freemen of the manor or persons who are sons of freemen. But then those persons, as we learn from the return to the mandamus, were, when they became members of this corporation, bound to take the oath of obedience to the lord of the manor—bound to take the oath to do him proper service. Now that shews this, that it is not simply by being members of a corporation that they are entitled to enjoy the right of free fishing, but that they must also become and swear duly to act as tenants of the manor. In my opinion those persons who become members of the corporation so as to be subject to the regulations of the corporation, and so as to join in making rules for the corporation, were also to be admitted as tenants of the manor, and as such, when they hold both those positions, then they are entitled to the benefit of enjoying this free franchise, the benefit of fishing for oysters. It is said that the corporation has made regulations for the mode in which that was to be enjoyed. We do not know what originally the orders made by the corporation were, but they have grown from time to time. One can quite see how it would be. When the oyster beds were exhausted by the members of the corporation as tenants of the manor fishing and dredging to excess, they would make regulations which would be binding on the members of the corporation, and they would enforce those orders. So that although the tenants of the manor and *Free Fishermen of Faversham* had a right to enjoy this franchise which was granted to the corporation, yet it was not that the corporation held it for their own benefit, but that the corporation making regulations restricted (whether rightfully or not is not material) the way in which the *Free Fishermen* and tenants of the manor, who enjoyed the franchise, were to exercise it so as not to prejudice the rights of all. That quite explains why it is that the present course is adopted—that the jury shall determine how many oysters are to be dredged, and that those members of the corporation, those tenants of the manor, who are in a position to dredge, should dredge a certain number and then should get paid for their labour in that dredging, the proceeds of the sale being ultimately divided between the members of the corporation. That is plain. If there was a race between all tenants of the manor who are also members of the corporation to dredge, there would be a great difficulty as to the dredging, and probably the oyster beds would be entirely exhausted and the benefit of the franchise would come to an end. In my opinion that does not shew that the corporation had the grant for their own benefit. It only shews that the mode in which it was agreed that the right to be exercised by these particular individuals should be exercised; and it is very material that not only were these persons who were entitled to the benefit of the franchise to be tenants of the manor and to take the oath to the lord, but the Court at which the regulations were made for the purpose of determining how the franchise should be exercised was the court of the manor, and is so described in old documents, and the steward presided and held that court.

In my opinion, therefore, here, although I hold and am of opinion that there was in fact a grant to the *Free Fishermen* which made them a corporation, that grant was held by them for the purpose of their allowing the individual members, tenants of the manor, *Free Fishermen of Faversham*, to enjoy as the beneficiaries that grant which had been made to the corporation. We have an example of the way in which that was carried out in *Goodman* v. *Mayor of Saltash* (1), in the House of Lords, where, it is true, the grant was assumed to be made to an entire corporation, consisting of entirely different persons, namely, the burgesses of *Saltash* (that was the old name of the corporation of *Saltash*), to hold it subject to the condition of allowing the free tenants in the borough to dredge oysters. Here, having regard to what we see as a fact (and there is not as much evidence as one could wish as to what the facts actually were), but so far as we can gather the facts, I think they all point to this, that although there is a grant to this corporation, incorporated for the purpose of receiving this grant, yet they held the property so granted to them only on trust for or for the purpose of allowing the *Free Fishermen*, tenants of the manor, to enjoy the franchise and to exercise it, although it is legally vested in the corporation. In my opinion, as that is so, it would be impossible to sell this franchise. It would be only selling a trust, that is to say, selling a property vested in the body to be wound up, where that body held it only on trust for certain persons. That would be utterly wrong; it could not be sold, and a trust cannot be wound up. You cannot wind up an association which is a trustee; you could only sell the property subject to the rights of the beneficiaries and those for whom the body proposed to be wound up held the property on trust. In my opinion, therefore, this order ought not to have been made, and must be discharged.

(1) 7 App. Cas. 633.

Bowen, L.J.:—

I agree. The principle to be applied is that laid down in *In re Chapel House Colliery Company* (1); namely, if putting in motion the statutory machinery for winding-up cannot possibly accomplish the purpose for which such machinery was invented by the Legislature, the Court will not make the order for winding-up. We have therefore to consider whether there is here any property which could usefully be sold, if we affirmed this order made against this company. To answer that question we must put to ourselves the inquiry in whom is the right of fishing. Is this a right to enjoy this fishery, vested either directly or indirectly in the corporators or members of the company, whatever they may be pleased to call themselves, or is it simply a right which belongs to the corporation, and out of which no part devolves directly on the corporators themselves by way of beneficial enjoyment or otherwise? It seems to me the only answer we could give to that on the materials before us, is that, whatever be the exact origin of these rights, whatever be the exact form in which we should clothe the necessary presumption to give validity to the user, certain it is that the *Free Fishermen of Faversham*, tenants of the manor and hundred of *Faversham*, have individually either a legal or an equitable right at all events to enjoy something in this fishery.

I think myself that in all probability the only way of accounting for the user, and of discovering, as we ought to endeavour to do, a legal origin commensurate with the user which will support it, is to assume that there has been a grant to a corporate body. I think that is the simplest, and I think myself it is the only way of accounting for this user; and therefore if the question was put to us, and we had to decide on the somewhat imperfect materials before us whether this company is a corporation or is not, I should say in all probability it was. But in any event, and whatever way you choose to treat it, whether there is a grant to a corporation or whether there is a trust in individuals, it seems to me to be clear that the *Free Fishermen*, who are members of this company, and who are tenants of the manor, have a direct interest in the fruition of the right. If that is so, the grant, if it

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(1) 24 Ch. D. 259.

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was a grant to a corporate body, as in all probability it was, must be taken to have been coupled with a condition which should make it inalienable for the benefit of anybody else except those persons whom I have named. In the same way if it is a trust which is vested in individuals for the benefit of these persons, it is equally inalienable. This is the short sense of the thing, that nobody except the *Free Fishermen of Faversham* who fulfil the conditions of the user have a right to fish there, and they could only do so under the rules and by-laws of the company. If that is so, how can the liquidator sell that right to anybody else? It is worth nothing, nor can it be alienated in the market. It seems to me that the case is not unlike *Goodman* v. *Mayor of Saltash* (1), though there is, of course, the distinction between the two which has been pointed out by the Lord Justice. It is also not unlike the case of *Walter* v. *Hanger* (2), where the charter was to the mayor and to the citizens of the city of *London*, that no prices should be taken of the wines of the citizens and freemen of *London*, and the Court held that the charter did not enure to the benefit of the body politic of the City, but only to the benefit of the particular persons of the corporation.

On these grounds it appears to me to be clear that these rights cannot be taken from these people and sold to other people, so that the other people can step into their shoes and enjoy them. Therefore it would be useless to make the order to wind up this company.

FRY, L.J.:—

I also feel myself unable to agree with the conclusion arrived at by the learned Judge from whom this appeal is brought. The objections which I feel to the order may be stated in three ways. In the first place, it appears to me that if the order be made, no benefit will enure from it to anybody except those gentlemen who are interested in costs. In the next place, it appears to me that we have before us the case of a corporation holding property upon either a condition or a trust, which confers individual and private rights upon the corporators, and that such a corporation is not to be wound up under ordinary circumstances. In the

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(1) 7 App. Cas. 633.

(2) Sir F. Moore, 832.

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last place, I put my objection to the present order on the fact that the property of the corporation, the fishery, is of great benefit to the public as well as to the company; and that we ought not to put an end to a public benefit which was in the mind of the Legislature for the purpose of satisfying private demands of creditors.

The history of the case appears to me to shew with reasonable clearness this result, that the free fishery in a portion of the sea near *Faversham* was by competent authority vested in a corporation, the *Company of Free Fishermen of the Manor and Hundred of Faversham;* and that that corporate property is held by them upon condition or upon trust which confers upon each individual member of the corporation the right of fishing within the waters in which that free fishing exists; a right of fishing, however, subject to certain powers in the body corporate to make rules and regulations with regard to the fishery. I think it will be found that grants to corporations, conferring similar individual or private benefits, are not very uncommon, and that, especially in the case of those charters which have granted exemptions, the exemption has often enured, as in the case to which Lord Justice *Bowen* has referred, not to the benefit of the corporation, but to the benefit of the individual corporators.

The evidence upon which I come to the conclusion which I have briefly stated is of two descriptions. In the first place, there is the existing user. The grant I conceive to have been of a free or exclusive fishery relating to all kinds of fish, but inasmuch as the oysters have proved by far the most valuable description of fish within this fishery, the fishery has sometimes been treated as if it related to oysters only: but according to the evidence before us that is not the case; and whilst the corporation has made certain rules and regulations restraining the competition of the members in regard to oysters, they have left free the right of each individual corporator to fish within the waters in question for all other fish. The witnesses say that when there is no dredging to be done the working members of the company employ their time in fishing for other fish on their own account, which they are allowed to do so long as they avoid the ground stocked with oysters. That appears to me to be a case in which the original perfectly free liberty of each individual has survived. There being no interest to interfere with it, it continues to exist as it probably did originally. That is one head of evidence—existing user. Another head of evidence on which I rely is the ancient documents which are in evidence before us. It appears to me that they are entirely consistent with the existing user. In the first place, we have the report of the Commissioners in the year 1591, and they state the right as existing not in the corporation, but in the individuals. They find that "it manifestly appears that the fishermen of the town of *Faversham* being admitted at Her Majesty's Court of Admiralty yearly holden within Her Majesty's manor of *Faversham,* have been time out of mind used, without let or interruption of any others, to fish and dredge." The report states the right to fish and dredge in the individuals. In a similar manner, in a decree in the Court of Admiralty, in the year 1655, the declaration was "that the tenants and fishermen of the manor and hundred of *Faversham,* and all and every one of them, had full right to fish and dredge for oysters," again stating the right to be in the fishermen as individuals. Again, in a bill in the Exchequer presented in the early part of last century (which although it might not have been evidence for the company, has been put in evidence by the Respondents), the statement made is to this effect, amongst others, that the free fishermen were in the habit of buying young oysters, or spat, they buying it individually as I understand; that they then laid them in the oyster beds within the boundaries of this fishery, and then at seasonable times the person who had so laid them took and sold them. Therefore we have an individual right with regard to particular classes of oysters in the fishery. Now it is not otherwise than illustrative of what I suspect to have been the history of this case, that we find that that particular mode of dealing with the spat has been changed, and that at the present time the jury determine how much spat shall be brought from outside the fishery within the fishery, and then the oysters which result from the maturing of that oyster spat, or young oysters, are sold for the benefit of the corporation,—a case in which the corporate rights, so to speak, have encroached on the individual rights. Lastly, the statement in the Act of 1840 appears to me consonant with the language of the earlier documents, because it alleges that the freemen and members of the company have bred, laid, dredged for, caught, had, and taken oysters and oyster-brood in the waters and creeks within the fishery exclusive of other persons, the company paying the rent. There, again, we find that the allegation of right is in the individual fishermen. I say, therefore, that we have the ancient documents and the present user all shewing right in the individuals.

I come, therefore, to the conclusion that the corporation is a corporation holding property for the purpose of conferring individual rights on the individual corporators. I know of no case, and no case can be produced, in which the Court, for the purpose of paying a debt of a trustee corporation destroyed the property of the individual corporators.

One word only with regard to the last point to which I adverted, which was the recital in the Act that this fishery is for the public benefit. I am bound to say that I should pause long before I was a party to the destruction, by winding-up, of an undertaking which the Legislature had solemnly declared to be of great benefit to the public as well as to the company itself. I will make this further observation, that the statute in which that recital is contained seems to me to carry evidence of the anxiety of the Legislature that this corporation should not be put an end to. It gave a power to the corporation to borrow money and to mortgage, assign, and charge the fishery and the profits arising therefrom, and it gave a particular form of charge, and that was a charge of interest at a certain rate to the debenture holders until the principal should be paid. It contained no stipulation with regard to the repayment of the principal, and no time at which it was to be repaid. Then it went on to provide that, in the event of default of payment of interest some person might be appointed to receive the whole or such part of the proceeds of the fishery and the money to be received for the sale of any oysters or oyster-brood, as were liable to pay such interest. There was, therefore, no charge given for the *corpus* of the moneys advanced on the fishery. The mode in which the right of the debenture holders was worked out was by their obtaining a receiver of the profits of the fishery. That looks to me very much as though the Legislature whilst authorizing the corporation to borrow for its purposes, at the same time was desirous that the corporate property should never cease to be vested in the corporation: for, although the profits might be received by a receiver and distributed amongst the debenture holders so long as there was default in payment, yet there was no power of sale given, no right to sell the fishery, no right against the fishery in any other way than by obtaining a receiver of profits. I doubt, therefore, whether the Legislature ever intended that the property so vested in the corporation should be put an end to by the claims of creditors.

For these reasons, I think the petition ought to have been originally rejected, and I suppose the right order now will be to dismiss the petition, with costs here and below.

Solicitors: *Warren, Gardner, & Murton; Powell & Burt; R. Walthew & Son; Flint & Gardner.*

M. W.

C. A.
1887
July 29, 30; *Aug.* 3.

In re CLARKE.
COOMBE *v.* CARTER.

[1886 C. 3113.]

Mortgage—After-acquired Property—Uncertainty—Divisible Agreement—Property under any Settlement or Will.

A mortgagor by deed assigned to the mortgagee all his household goods and farming stock, and "also all moneys of or to which he then was or might during the security become entitled, under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of any person;" and also all real and personal property "of, in, or to which he was or during that security should become beneficially seised, possessed, entitled, or interested, for any vested, contingent, or possible estate or interest."

The mortgagor afterwards became entitled under a will to a share of the personal estate of the testator:—

Held, that the assignment of after-acquired property was divisible; and that although the general assignment of all property to which the mortgagor might become entitled might be too wide, as to which the Court gave no decision, the assignment for valuable consideration of all moneys to which he should become entitled under a will operated as a contract which the Court would enforce, and that the share of the personal estate of the testator was accordingly included in the mortgagor's security.

Belding v. *Read* (1) questioned.

The decision of *Kay*, J., affirmed.

THIS was an appeal from a judgment of Mr. Justice *Kay* (2).

By an indenture dated the 18th of January, 1876, and made between *George Hart* (thereinafter called the mortgagor) of the one part, and *T. Wooraker*, secretary of the *South Essex Equitable Investment and Advances Company* (*Limited*), (thereinafter called the mortgagee) of the other part, in consideration of the sum of £800 paid by the mortgagee to the mortgagor, the mortgagor granted and assigned to the mortgagee "all the household goods, and also all the live and dead farming stock, tenants' rights, and interests of the mortgagor of, in, or upon any farm now held, or which during this security may be held by the mortgagor: also all real and personal estate to which the mortgagor shall become entitled under the will of his father *George Hart;* also all moneys of or to which he now is or may during this security become entitled under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of his father, or any other person or persons; also the policy of assurance on the life of the mortgagor in the sum of £1000, and numbered 41,134, in the *Liverpool and London Globe Insurance Company;* also all other the freehold hereditaments, goods, chattels, effects, debts, securities, documents, vouchers, books of account, fixtures, and personal property of, in, or to which the mortgagor is or during this security shall become beneficially seised, possessed, entitled, or interested for any vested, contingent, or possible estate or interest," with certain exceptions therein mentioned, unto the mortgagee, his heirs, executors, administrators, and assigns, by way of mortgage for securing the repayment of £800, and all further sums in which the mortgagor should thereafter be indebted to the mortgagee.

The indenture is stated more fully in the previous report.

By an indenture dated the 15th of May, 1885, for the consideration therein mentioned, all so many and such part or parts

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(1) 3 H. & C. 955.

(2) 35 Ch. D. 109.

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as were then subsisting of the personal property mentioned or referred to in the mortgage, and the full benefit of the mortgage, were assigned and transferred to *C. Carter* and *W. J. Carter.*

In April, 1881, *George Hart* filed a petition for liquidation, and a trustee in the liquidation was appointed.

On the death on the 13th of September, 1884, of *Thomas Clarke* the testator in the action, *George Hart* became entitled under his will, dated in 1875, to one twenty-third share, amounting to £184, of his residuary estate.

An originating summons was taken out by the executor of *Clarke's* will, to raise the question whether *G. Hart's* share in the residuary estate of the testator was comprised in the mortgage.

Mr. Justice *Kay* held that the share was included in the mortgage, and from this decision the trustee in *G. Hart's* liquidation appealed.

Begg, for the Appellant:—

The cases as to assignment of future property depend on the doctrine of specific performance: *Holroyd* v. *Marshall* (1); and to make the assignment effectual in equity it must amount to a contract of which the Courts would decree specific performance. The same point is put very clearly in *Collyer* v. *Isaacs* (2). In the present case the contract is too vague to be specifically performed: *In re Count d'Epineuil* (3); *Belding* v. *Read* (4); *Official Receiver* v. *Tailby* (5). Marriage settlements are treated as exceptions to the rule: *Hardey* v. *Green* (6). There is nothing unreasonable in all a married woman's property being settled. But it is against public policy for a man to assign all his property present and future. It would prevent him from getting his living.

Byrne, for the mortgagees:—

The assignment of future property operates as a covenant to assign it, which will be enforced in equity, as it is for valuable consideration. If such a covenant is good in a marriage settle-

(1) 10 H. L. C. 191.
(2) 19 Ch. D. 342, 351.
(3) 20 Ch. D. 758.
(4) 3 H. & C. 955.
(5) 18 Q. B. D. 25.
(6) 12 Beav. 182.

ment, why is it not good in a mortgage, which is equally for valuable consideration? A covenant to convey future property is not too vague if at the time when the conveyance is made the property is ascertained: *Bennett* v. *Cooper* (1); *Collyer* v. *Isaacs* (2). But it is immaterial in the present case whether the general words in this mortgage are or not too wide, because the agreement to assign is divisible. There is a distinct agreement to convey all property that may come to the mortgagor by will, and where the agreement is divisible the Court will enforce it as to that part which relates to property which is ascertainable: *Clements* v. *Matthews* (3). In *Official Receiver* v. *Tailby* (4) and *Belding* v. *Read* (5) the Court held that the agreements to assign were not divisible, therefore those cases are not authorities against us.

Yate Lee, for the Plaintiff.

1887. Aug. 3. COTTON, L.J.:—

This is an appeal by one of the Defendants from a judgment of Mr. Justice *Kay*, who held that as between mortgagees and the trustee in bankruptcy of the mortgagor, the mortgagees were entitled to a legacy bequeathed to the mortgagor.

By a deed dated the 18th of January, 1876, the mortgagor assigned property which could be disposed of at law, being property to which he was then entitled, and also "all moneys of or to which he now is or may during this security become entitled under any settlement, will, or other document either in his own right or as next of kin of his father, or any other person or persons"—after which followed very general words purporting to sweep in all the future property of the mortgagor. It is clear that an assignment cannot at law pass future property, but it may be made effectual against future property on the ground that a Court of Equity will in a suitable case enforce it as a contract. The question is whether this assignment gave the mortgagee an effectual charge upon a share of the residuary estate of the testator in this action, which came to the mortgagor in 1884, on the death of the testator.

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(1) 9 Beav. 252.

(2) 19 Ch. D. 342.

(3) 11 Q. B. D. 808.

(4) 18 Q. B. D. 25.

(5) 3 H. & C. 955.

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It is necessary first to consider the principles on which an assignment of property not existing at the time is made effectual. The principle is that such an assignment as regards the non-existing property amounts to a contract for value, which a Court of Equity will specifically perform. That was laid down by Lord *Westbury* in *Holroyd* v. *Marshall* (1), and I should not have gone back to this were it not that there seems to be a misunderstanding as to the application of the doctrine of specific performance in these cases. The ordinary application of the doctrine of specific performance is to compel a vendor or purchaser to complete a contract for sale or purchase, a contract which is wholly executory. Where such a contract relates to goods the Court will not in general decree specific performance. Why is this? Because the Court considers that in general damages are a sufficient remedy, and the proper remedy for the breach of a contract to sell or purchase goods, but that does not apply to a breach of a contract relating to land. In the present case the contract is not wholly executory. The mortgagee has performed his part of it by advancing his money on the faith of it, and the principle that damages are a sufficient remedy does not apply. Still there may be grounds which will induce a Court of Equity to refuse specific performance. It may be that the Court cannot ascertain the property, in that case it will refuse to enforce the contract on the ground of vagueness. That the property cannot be identified at the time when the contract is made does not signify if it can be identified at the time when the Court is asked to carry the contract into effect. Again, a contract may be so wide that the Court might consider it wrong to enforce it—wrong on the ground that if fully carried into effect it would prevent the party from paying his debts, and deprive him of the means of subsistence. Such an objection was adverted to in *In re Count D'Epineuil* (2). Having stated these general principles I will proceed to consider whether the present contract is open to objections which would make it right to refuse specific performance of it.

In my opinion the decision that this legacy is effectually charged in favour of the mortgagee is right. This in my judgment is a divisible contract. The general words at the end of the assignment are so wide that a Court of Equity might say they were too wide to be enforced. I do not decide that question, for in my opinion it is not necessary to do so. We have here a distinct assignment of legacies, and that is not too wide to be enforced. Is it too vague? As I have said vagueness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract. Legacies are capable of being as readily identified as anything that can be mentioned. Light is thrown upon this subject by the cases on covenants in marriage settlements to settle the wife's future property. It is said that marriage settlements are favoured instruments, and that the cases on them furnish no guide as to other instruments. I cannot agree with this. It is true that an agreement to settle a wife's future property is not open to the second objection I have mentioned, for an agreement to settle upon a wife and her children all property that comes to her during the marriage cannot be considered unreasonable. But as regards the other objections, it appears to me impossible to hold that a covenant which is not too vague to be executed when it is found in a settlement is too vague when found in a mortgage. In *Bennett* v. *Cooper* (1) Lord *Langdale* held that a collateral security, very similar in its nature to the present, ought to be enforced. The description there was "all sums of money then or thereafter to become due to him, and all legacies or bequests, which had already or might thereafter be given or bequeathed to him or his wife, by any person whomsoever," and it was held that legacies subsequently bequeathed to the mortgagor were bound. That disposes of the present case, but I will refer to some of the cases cited to us.

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(1) 10 H. L. C. 191.

(2) 20 Ch. D. 758.

In *Belding* v. *Read* (2) the Court appears to me to have gone wrong on the construction of the instrument. Instead of treating it as a divisible contract to assign the effects to be in or upon the assignor's premises at *Reedham*, and also to assign all the personal estate to which he should be entitled anywhere in *Great Britain*, they treated it as one indivisible contract and as too vague to be enforced. Perhaps if the contract had been one indivisible contract a Court of Equity might say that it ought not to be enforced

(1) 9 Beav. 252.

(2) 3 H. & C. 955.

because it would be almost impossible to ascertain what was included in it, and because if enforced it would take away the assignor's whole means of livelihood. Mr. *Begg* contended that the Judges did not treat it as an indivisible contract, but it appears to me that they did, and I expressed my view to that effect in *Clements* v. *Matthews* (1). They had not and could not have had before them the decision of *Clements* v. *Matthews*, where the Court of Appeal held the contract to be divisible. I may observe that in *Official Receiver* v. *Tailby* (2) the Master of the Rolls seems to have thought that in *Clements* v. *Matthews* I expressed an opinion that the general words alone would not have bound the future property. I did not mean to give any opinion one way or the other on that point, which it was unnecessary to decide. I thought that the contract was divisible, and that the property in question came within that branch of it to which no objection on the ground of vagueness could be raised, and was therefore bound, so that it was unnecessary to consider whether it would have been bound if the contract had only contained the general words.

The case of the *Official Receiver* v. *Tailby* was much pressed on us by the Appellant. It is a decision of the Court of Appeal, and if it were the same as the present case we should be bound by it. But the case was very different, it turned on an assignment of "all the book debts due and owing, or which may during the continuance of the security become due and owing, to the said mortgagor." We have not here the difficulty which the Court of Appeal had in that case. The contract here refers to property capable of being identified. I am not certain on what grounds the Court of Appeal arrived at their decision in that case, for they do not lay down any principle, and whatever the grounds were I think that the case does not apply to the very different terms of the present instrument. The appeal in my opinion fails.

BOWEN, L.J.:—

I am of the same opinion, and take the same view as Lord Justice *Cotton*. The time will come when the Court of Appeal will have to consider the law as to assignments of future property,

(1) 11 Q. B. D. 808.

(2) 18 Q. B. D. 25.

and to lay down, if it can, for the guidance of the profession some more definite rule than is to be gathered from the cases since *Holroyd* v. *Marshall* (1). As it seems to me, language has been used in some of them which tends to confuse the two distinct ideas, of vagueness in the contract, and vagueness which arises from the difficulty of identifying future property. "Vagueness" is a misleading term. A contract may be so vague in its terms that it cannot be understood, and in that case it is of no effect at law or in equity. There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come *in esse* and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent a Court of Equity from enforcing the contract. Even then there may be something in the nature of the contract which will prevent its being enforced. I will not attempt to define what will have that effect. It is suggested that, as distinct from vagueness, there may be such wideness in a contract that it ought not to be enforced by a Court of Equity. Thus it is said a contract by a man to assign all the property that shall come to him would be too wide to be enforced. I will give no opinion on that point till it comes before us for decision.

A contract may, of course, be one of which a Court of Equity cannot decree specific performance, because it relates to nothing specific; *e.g.*, a contract to supply a given quantity of goods of a particular description. That is a case where the subject-matter cannot be ascertained. And even where the subject-matter is ascertained there may be cases where a Court of Equity will not interfere. The uncertainty of the subject-matter at the time when the contract is entered into does not seem to me an adequate ground however for declining to interfere if the subject-matter has become ascertained when the Court is asked to enforce the contract. I am aware that there may be an important distinction between a case where the contract is wholly executory and a case where the whole consideration has been paid. I only wish to say that in my opinion the subject is one of great difficulty, that it does not appear to me to have been exhaustively considered, and

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(1) 10 H. L. C. 191.

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that there is a good deal of obscurity in the language often used about it. I retain the same doubts as I expressed in *Clements* v. *Matthews* (1).

In *Holroyd* v. *Marshall* (2) Lord *Westbury* says: "If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained." I must express my concurrence with Lord Justice *Cotton* as to the difficulty of making a distinction between contracts on marriage and other contracts as regards the question of vagueness.

As to the cases cited, I think that in *Belding* v. *Read* (3) the Court construed the agreement wrongly, and that the case cannot stand with *Clements* v. *Matthews*, as I intimated in *Reeves* v. *Barlow* (4). I ought to add that I am not satisfied that the Judges in *Belding* v. *Read* altogether appreciated the observations of Lord *Westbury* in *Holroyd* v. *Marshall* (5).

Official Receiver v. *Tailby* (6) is a peculiar case. In *Holroyd* v. *Marshall* it was laid down that when the property comes into possession you must see whether the subject-matter of the contract is such that the Court would decree specific performance. In *Official Receiver* v. *Tailby* the Court laid down no principle as to what contracts can be specifically performed; they only said that the contract before them could not, and I am not sure how they construed it. The present contract is entirely different. According to *Clements* v. *Matthews* (1) it can be divided, and I see no reason for saying that a contract to assign all legacies which shall be bequeathed to the mortgagor is one which a Court of Equity will not perform. It is therefore unnecessary to go into the question whether, if the assignment had contained only the sweeping general words, the property would have been bound. I agree, therefore, that the appeal fails.

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(1) 11 Q. B. D. 808, 817.
(2) 10 H. L. C. 211.
(3) 3 H. & C. 955.
(4) 12 Q. B. D. 436.
(5) 10 H. L. C. 191.
(6) 18 Q. B. D. 25.

FRY, L.J. :—

I agree with the other Lords Justices in thinking that the decision of Mr. Justice *Kay* is right; but as the question is of general importance I will add a few words.

We have not to consider the cases where an assignment of future property is made effectual by what Lord *Bacon* calls "*novus actus interveniens*" (2). There is another class of cases where an assignment of future property will have effect given to it as a contract to give a security on future property, namely, where the consideration has been received and the property has come into existence. That there are cases in which the Court will enforce such a contract is not in dispute. I think that there may be cases where the Court will not do so, owing to the nature of the subject-matter of the contract, and the authorities appear to indicate the existence of such a class of cases. *Belding* v. *Read* (3) indicates it, though I think that in that case the Court drew a wrong boundary line, and were in error in holding that in such a case a Court of Equity would not decree specific performance. In *Official Receiver* v. *Tailby* (4), where the contract was indivisible, the Court held that it was one which could not be enforced, and I, considering myself bound by *Belding* v. *Read*, came to the same conclusion in *In re Count D'Epineuil* (5). There may, I think, be contracts of such a nature that the Court will not decree specific performance of them. It might say that a contract by a man to assign all his future property by way of mortgage was one which

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(1) 11 Q. B. D. 808.

(2) See *Holroyd* v. *Marshall* (2 D. F. & J. at p. 603); Bacon's Maxims.

(3) 3 H. & C. 955.

(4) 18 Q. B. D. 25.

(5) 20 Ch. D. 758.

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ought not to be enforced, because it would deprive the assignor of the means of livelihood, and would tend to a multiplication of actions for getting in the different parts of the property, which the assignor would be bound to assign from time to time. But in the present case we have not to draw the line between contracts which the Court will enforce and contracts which it will not. The cases where the contract is wholly executory on both sides differ materially from a case like the present, where the contract on one side has been performed. Wherever the boundary line is to be drawn I am satisfied that the present falls within the class of cases where the contract will be enforced. It is a contract relating to several subject-matters, one being all real and personal estate to which the mortgagor may become entitled under any will. I can see no reason for not specifically performing that contract as to any property that comes to the mortgagor under a will. He has received the consideration and ought to perform his part of the contract. Such a contract was enforced by Lord *Langdale* in *Bennett* v. *Cooper* (1), and though we are not bound by his decision I think it one which ought to be followed.

The Appellant very properly pressed upon us the case of *Official Receiver* v. *Tailby* (2), where the Court came to the conclusion (and it may be a right conclusion) that a contract to assign all book debts which should be owing to the mortgagor was too vague to be enforced. If the case had been in point we should have submitted to it. The Court seemed inclined to hold that the agreement included not only all debts entered in the assignor's books, but all debts which ought to be so entered, in which case it might be held that the uncertainty made the contract one which the Court could not enforce. There is no such difficulty here; the contract is quite different, and as I cannot find that the Court in that case laid down any principle, I do not think that it is any authority against our decision. The appeal, in my opinion, fails.

Solicitors: *Storey & Cowland,* agents for *Crick & Freeman, Maldon; Paterson, Snow, & Co.,* agents for *F. T. Veley, Chelmsford; Duffield & Bruty.*

(1) 9 Beav. 252.

(2) 18 Q. B. D. 25.

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KEKEWICH, J.

Feb. 23, 24, 25; *March* 14.

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Aug. 1, 2, 5, 9.

Restraint of Trade—Public Policy—"So far as the Law allows"—Reasonable Limits—Costs on Higher Scale.

On a dissolution of partnership the retiring partner, who received a large sum of money, covenanted "to retire from the partnership; and, so far as the law allows, from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." The business had been carried on at *Wolverhampton* and in *London.*

In an action by the survivor of the continuing partners and his assignees to restrain the retiring partner from carrying on a similar business in *Middlesex*:—

Held (reversing the decision of *Kekewich*, J.), that the covenant to retire from the business so far as the law allows was too vague for the Court to enforce.

By *Cotton*, L.J. (*Bowen* and *Fry*, L.JJ., giving no judicial opinion):—The old rule that the law does not allow an absolute covenant in restraint of trade is still binding, and the covenant was void on that ground also.

Held, also, that the covenant not to trade, act, or deal, so as to directly or indirectly affect the continuing partners was personal to the continuing partners, and could not be sued upon by their assignees.

And, *semble*, it was also too vague for the Court to enforce.

The changes in the doctrine of public policy and the authorities discussed.

Costs on the higher scale according to Order LXV., rule 9, allowed.

EDWARD ALBERT DAVIES, Edward Davies, and *James Davies*, under the style of "*Davies Brothers & Co.,*" carried on the business of galvanized iron manufacturers or galvanizers at *Wolverhampton,* with a place of business in *London. Edward Davies* was the father of *E. A. Davies* and *James Davies.* Disputes arose between them, and an action was brought for dissolution. The action was compromised, and an agreement for dissolution, dated the 15th of July, 1884, was made, and was followed by a formal deed of dissolution. The deed, according to the evidence, was fully discussed beforehand, and the result of evidence as to the knowledge of the parties is stated in the judgment of Mr. Justice *Kekewich.* The deed was dated the 11th of October, 1884, and by it *James Davies* assigned to *E. A. Davies* and *E. Davies* all his share and interest in the property and goodwill of the partnership; *E. A. Davies* and *E. Davies* covenanted to pay to *James Davies* £10,500 at the times and in the manner therein mentioned: *E. Davies* released *James Davies* from a sum of £1600 or thereabouts then due from him; and *James Davies* covenanted, amongst other things, as follows:—

> "The said *James Davies* to retire wholly and absolutely from the partnership, and, so far as the law allows, from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as to either directly or indirectly affect the said *E. Davies* and *E. A. Davies*."

It appeared from the evidence that this clause was taken from the original agreement for compromise; and that the parties intended to insert a more precise covenant in the formal deed; but that after some discussion, as they could not agree on the form of the covenant, they retained the clause as originally drawn.

The £10,500 had been paid except £1000, which had been retained in pursuance of other provisions in the deed of dissolution. *E. Davies* and *E. A. Davies* carried on the business until the death of *E. Davies* in 1885; and the business had since been transferred to a company called "*Davies Brothers & Co., Limited.*"

In 1885 *James Davies* entered into partnership with one *W. S. Codner*, who had formerly been an agent for *Davies Brothers & Co.*, and they issued a circular stating that they were "merchants and manufacturers of galvanized hollow ware tanks, &c., under the style of *Davies, Codner & Co.* Our Mr. *James Davies* was formerly managing partner of the firm of *Davies Brothers & Co., Crown Works, Wolverhampton.*" They also published advertisements to the same effect, and they had solicited orders from customers of the old firm. They were now carrying on their business at 380, *Old Street, Shoreditch.*

The limited company and *E. A. Davies* brought this action, claiming that the Defendant *James Davies* might be restrained from carrying on the business of a galvanizer or galvanized iron manufacturer in *Middlesex.*

The Defendant alleged that he and his partner made goods of a certain description which were afterwards galvanized, but not by them; and denied that he carried on the business of a galvanizer or otherwise committed any breach of the covenant. He also pleaded that the covenant was void as too vague and as being in restraint of trade. He also alleged that subsequent negotiations between the parties amounted to acquiescence in his dealings; but, as appears from the judgment, the Court held that there had been a breach of the covenant, and that there had been no acquiescence.

The action came on for hearing before Mr. Justice *Kekewich* on the 23rd of February, 1887.

Warmington, Q.C., and *C. Walker*, for the Plaintiffs:—

General covenants in restraint of trade are bad, but limited covenants are good, and what are reasonable limits must depend on the circumstances of each case. Even if part of the covenant is bad the Court will maintain the valid and reject the invalid part of such a covenant: *Price* v. *Green* (1). *Horner* v. *Graves* (2) gives a clear rule as to the boundary. It cannot be illegal to covenant to observe the rules of law: *Avery* v. *Langford* (3); *Countess of Harrington* v. *Earl of Harrington* (4). As the means of communication increase, the area of restriction must be allowed to increase: *Archer* v. *Marsh* (5). The parties may now settle what they please if the public is not injured: *Wallis* v. *Day* (6); *Whittaker* v. *Howe* (7); *Leather Cloth Company* v. *Lorsont* (8). In *Rousillon* v. *Rousillon* (9) the covenant was unlimited as to space. *Mallan* v. *May* (10); *Pownall* v. *Graham* (11); *Rannie* v. *Irvine* (12).

Barber, Q.C., *Cock*, Q.C., and *Russell Roberts*, for the Defendant:—

(1.) This covenant is too vague to be enforced. (2.) It is void

(1) 16 M. & W. 346.
(2) 7 Bing. 735.
(3) Kay, 663.
(4) Law Rep. 5 H. L. 87.
(5) 6 A. & E. 959.
(6) 2 M. & W. 273.
(7) 3 Beav. 383.
(8) Law Rep. 9 Eq. 345.
(9) 14 Ch. D. 351.
(10) 11 M. & W. 653.
(11) 33 Beav. 242.
(12) 8 Scott, N. R. 674; 7 Man. & G. 969.

as against the policy of the law. (3.) There has been no breach. (4.) The Plaintiffs have acquiesced in what the Defendants have done. On the first point, the clause has no clear meaning; "retire" may mean merely leave that partnership. An injunction is not granted unless the case is clear, and the Court will not add conditions: *Kerr* on Injunctions (1); *Churchward* v. *Reg.* (2); *Erskine* v. *Adeane* (3). In fact, the Court must say what this covenant means before it can grant any injunction. On the second point, the rule as to public policy was established in the middle ages, and no doubt latterly the tendency has rather been to consider whether the restriction is reasonable, but still the rule exists and is acted on: *Story's* Equity Jurisprudence (4); *Pollock* on Contracts (5); *Hitchcock* v. *Coker* (6). The restriction must still be partial; *Collins* v. *Locke* (7); *Allsopp* v. *Wheatcroft* (8). In no case has a general covenant like this been held good.

[KEKEWICH, J., referred to *Harms* v. *Parsons* (9).]

In *Price* v. *Green* (10) the limits were given.

Witnesses were then examined on both sides, especially as to alleged breaches and as to the acquiescence.

Russell Roberts, summed up:—

A covenant of this sort must be partial; being only reasonable is not enough. *Horner* v. *Graves* (11) is not against that: *Ward* v. *Byrne* (12). No doubt in some of the cases the interest of the public has been lost sight of and reasonability only has been considered, and in many cases the two principles were confused; but the principle of public policy still exists and must be acted upon: *Hinde* v. *Gray* (13), and *Tallis* v. *Tallis* (14).

[KEKEWICH, J., said he had no doubt that the covenant had been broken, and that there had not been acquiescence; but he had considerable doubts as to the law applicable to the case.]

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(1) 2nd Ed. p. 392.
(2) 1 Q. B. D. 173, 195, 211.
(3) Law Rep. 8 Ch. 756, 763.
(4) § 292.
(5) 4th Ed. p. 311.
(6) 6 A. & E. 438, 457.
(7) 4 App. Cas. 674.
(8) Law Rep. 15 Eq. 59.
(9) 32 Beav. 328.
(10) 16 M. & W. 346.
(11) 7 Bing. 735.
(12) 5 M. & W. 548.
(13) 1 Man. & G. 195.
(14) 1 E. & B. 391.

Warmington, in reply:—

The goodwill has been sold, and this is a necessary stipulation to protect the goodwill. The Defendant has sold it and now wants to retain it. In each case the Court must look at the position of the parties and decide what is a proper and reasonable restriction. Unless there is a limitation by metes and bounds it is better to leave it "as the law allows." "Affecting" is not a vague word, and relates merely to this business, and its object is clearly defined. All parties knew that the outgoing partner was not to solicit business from others, and such a covenant is quite reasonable if the goodwill is to be protected. The subject of public policy was considered in *Egerton* v. *Earl Brownlow* (1), but public policy changes, and what was thought wrong at one time may cease to be so thought, and old cases may be overruled. *Pilkington* v. *Scott* (2) shews the anxiety of the Court to give effect to such a covenant. *Ward* v. *Byrne* (3) was a stronger case. *Hinde* v. *Gray* (4) is not now law. *Tallis* v. *Tallis* (5) was much criticised in *Rousillon* v. *Rousillon* (6). *Elves* v. *Crofts* (7) is a most instructive case. In *Jacoby* v. *Whitmore* (8) such a covenant was enforced. *Mumford* v. *Gething* (9) shews that there is no strict rule as to space.

1887. Mar. 14. KEKEWICH, J.:—

Having had occasion not long ago to consult the authorities on covenants in restraint of trade, I found it difficult to state any rules with precision or, to use the language of Chief Justice *Parker*, "to reconcile the jarring opinions." Having now consulted them more at large and with the assistance of counsel's criticisms, I find my difficulty rather increased than diminished. It is the embarrassment of wealth, for the authorities are numerous, and include decisions of eminent Judges and opinions

(1) 4 H. L. C. 1.
(2) 15 M. & W. 657.
(3) 5 M. & W. 548.
(4) 1 Man. & G. 195.
(5) 1 E. & B. 391.
(6) 14 Ch. D. 351.
(7) 10 C. B. 241.
(8) 32 W. R. 18.
(9) 7 C. B. (N.S.) 305.

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of professors competent to speak. It is not for me to suggest how this embarrassment could have been avoided; still less is it for me to suggest how it can be remedied by a decision of the highest Court of Appeal, or if need be by legislation. I disavow any wish or intention to do more than find, if possible, a guide to the solution of the particular question before me.

All authorities, from first to last, concur in one thing—viz. that the doctrine on this subject is founded on "public policy;" and I cannot but regard the jarring opinions as exemplifying the well-known *dictum* of Mr. Justice *Burrough* in *Richardson* v. *Mellish* (1) that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." Public policy does not admit of definition and is not easily explained. If that statement requires authority, turn to *Egerton* v. *Earl Brownlow* (2) and consult the arguments of counsel and the opinions of Judges covering the whole subject including, in some passages to which I will presently call attention, that part of it which concerns restraint of trade. One thing I take to be clear, and it is this—that public policy is a variable quantity; that it must vary and does vary with the habits, capacities, and opportunities of the public; that it cannot have been the same when Chief Justice *Tindal* decided *Horner* v. *Graves* (3) in 1831 as it was when Chief Justice *Parker* decided *Mitchel* v. *Reynolds* (4) in 1711; that it must have changed, and did change, between 1831 and 1869 when Vice-Chancellor *James* decided *Leather Cloth Company* v. *Lorsont* (5); and if there had not been a further change before Lord Justice *Fry* decided *Rousillon* v. *Rousillon* (6) in 1880, it must have occurred ere now.

There are many circumstances familiar to us all, and some of them connected with politics rather than with policy, which have materially altered the relative position of rivals in trade and of the public whom traders supply. Railways, electric telegraphs, and telephones, have all exercised an influence, and quite recently the parcels post, to say nothing of many other novelties, has introduced new elements into competition. I make these remarks,

(1) 2 Bing. 229, 252.
(2) 4 H. L. C. 1.
(3) 7 Bing. 735.
(4) 1 P. Wms. 181.
(5) Law Rep. 9 Eq. 35.
(6) 14 Ch. D. 351.

because to my mind they go a long way to explain the difference between earlier and later decisions. Judges have been bound to recognise not merely the old decisions, but the principles on which they were founded, and yet, regarding public policy as the principle overriding all, they have struggled to adapt these older decisions to the changed circumstances of the day. There has, I think, been a steady though irregular progress from the stricter rules of the last century, and perhaps it has not yet reached its limit.

According to the old cases the rule was simple enough, and the reason of it was clear. We have the highest authority for saying that, according to *Mitchel* v. *Reynolds* (1), the general rule was that "all restraints of trade which the law so much favours, if nothing more appears, are bad." In other words the presumption of law was against them, because the law favoured the utmost competition in trade. There are frequent statements in the books, that in thus favouring trade the law desired to assist every man to earn his living by that trade for which he was apt; and possibly some Judges thought that this was required by public policy, but to my mind what is really meant by the law favouring trade is, that it was considered a matter of essential importance to encourage all men to trade in order that the public might gain advantage by their trading—in other words it was considered public policy to assist *England* to become a nation of traders.

From the first, exceptions to the rule were established. These exceptions are generally accepted as amounting to a doctrine judicially settled that a covenant in restraint of trade must in order to be supported comply with three conditions. They are not always stated in the same order, and I may therefore state them in the order most convenient to myself. They are these: first, the covenant must be made on adequate consideration; secondly, the restraint must be partial; and thirdly, it must be reasonable. As regards the first it was laid down in *Hitchcock* v. *Coker* (2), which is recognised by Sir *G. Jessel* in *Gravely* v. *Barnard* (3) as settling the point, that the Court cannot inquire into the adequacy of consideration moving a contract between two competent parties. A nominal, that is to say an unreal, consideration will not suffice, but provided there is real consideration the Court will not inquire further or pause to consider whether the object gained was at all commensurate with the price paid for it, or whether the covenantee really required the benefits for which he stipulated. *Hitchcock* v. *Coker* (1) was decided in 1837, and of itself shews a large departure from the original rules.

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(1) 1 P. Wms. 181.

(2) 6 A. & E. 438.

(3) Law Rep. 18 Eq. 518.

Notwithstanding that the two other conditions have, in conformity with many authorities, been above stated separately, I cannot but think that they are and have of late been treated as one. Indeed, I am not sure that some confusion has not arisen from their being treated otherwise. The partial character of supportable restraints of trade may be the most essential feature and evidence of their reasonableness, and may of itself constitute reasonableness, but I venture to think that it is in truth no more than this, and that, notwithstanding many *dicta* to the contrary, the authorities for the proposition that a covenant, in order to be supported, must be partial, are better understood if construed to mean that they must be reasonable. I therefore proceed to consider what is a reasonable restraint of trade.

With three exceptions, which I will presently notice, it has always been held that a covenant, in order to be reasonable, must be limited as regards space. I do not think that I am bound by any authority to hold that it must be limited as regards persons, and the practical objections to so holding at the present day are obviously greater than those to supporting the necessity of limit as regards space. *Collins* v. *Locke* (2) might be cited as against this, but in truth it can better be referred to the class of covenants good for partiality as regards space. A limit as regards persons may, however, be useful towards making a restraint reasonable, as for instance, not to solicit customers of a firm within, say, the *United Kingdom*, might render a restraint reasonable which would not be so otherwise. The limit of time is of little value. It enters into some cases, as, for instance, *Whittaker* v. *Howe* (3) and *Rousillon* v. *Rousillon* (4), to be presently mentioned, but it was scarcely regarded there, and can seldom, if ever, be the basis of judgment. This is fully explained by Mr. Baron *Parke* in *Ward* v. *Byrne* (1), and also in a useful contribution to the learning on this subject which will be found in the notes to *Hunlocke* v. *Blacklowe* (2). There are some other possible limits which might be introduced to make a restraint reasonable, on which I need say no more than that, whenever that character can fairly be ascribed to them, they deserve favourable consideration. *Jones* v. *Lees* (3) is a case of this class (see the judgment of Mr. Baron *Bramwell* (4)). *Whittaker* v. *Howe* (5) is the first case in which a covenant unlimited as regards space was upheld. A different conclusion would at least have been as consistent with *Horner* v. *Graves* (6), which was intended to be followed, and, bearing in mind the doubt about this authority long ago suggested by a note to *Mitchel* v. *Reynolds,* in *Smith's* Leading Cases (7), and therefore long current in the profession, I should hesitate to treat it as a safe guide, though haply bound by it in a case precisely similar. The next case is *Leather Cloth Company* v. *Lorsont* (8), where Vice-Chancellor *James* upheld a covenant by the vendors of a process of manufacture with their vendees that they would not directly or indirectly carry on or allow to be carried on in any part of *Europe* (which, for the purposes of the case, may be read as meaning *Great Britain*) any company or manufactory having for its object the manufacture or sale of productions then manufactured in the business or manufactory of the covenantors, and would not communicate to any person the means or process of the manufactures so as to interfere with the vendees. This case is important, first, because it is a good example of the class of cases in which covenants in restraint of trade have been connected with the sale of a business or goodwill; and, secondly, because the Vice-Chancellor stated the principles guiding him in language different from that employed by any other Judge before him, and, I think, implying some departure from the ordinary explanation of the principles of public policy. He does not say as much, but I think he intended to hold that nothing could be against public policy which was reasonable, and that nothing could be unreasonable which, according to the experience of mankind, was prudently required to secure to a purchaser the exclusive enjoyment and benefit of that which he had contracted to purchase, and for which he had paid the consideration stipulated by the vendor. He contrasts freedom of contract with freedom of trade, and shews that both are equally the favourites of public policy. The passages in his judgment to which I refer will be found on pages 354–5. The same contrast was strongly insisted on in the third case, *Rousillon* v. *Rousillon* (1), where Lord Justice *Fry* (then Mr. Justice *Fry*) sustained a covenant by the agent of a firm of champagne merchants not to establish himself or to associate himself with other persons or houses in the champagne trade for ten years in case he should leave their employment. Lord Justice *Fry* rested his judgment on the contrast just mentioned, and held to be sound a rule extracted from *Mallan* v. *May* (2), that a defendant alleging the invalidity of a contract on the ground that it is in restraint of trade, has cast on him the burden of shewing it to be clear that the protection extends beyond what the plaintiff's interests require. He further examined the alleged rule that a contract, if good, must be limited as to space, and held in the result that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances under which such prohibition has been unreasonable. This seems to me to accord with common sense, and, if so, it ought also to accord with sound law. I can well understand, notwithstanding *Whittaker* v. *Howe* (3), that the inhabitants of, say, *Cornwall* or *Cumberland* ought not to be deprived of the services of a local solicitor practising in, say, *Bodmin* or *Carlisle*, because he was formerly a clerk in the employ of a solicitor or a member of a firm of solicitors practising in, say, *London* or *Birmingham*. And, to take an illustration from a business which has been singularly fruitless in contributions to this branch of the law, it would be difficult, I think, to hold that the inhabitants of a country town, even within a moderate distance from

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(1) 6 A. & E. 438.

(2) 4 App. Cas. 674.

(3) 3 Beav. 383.

(4) 14 Ch. D. 351.

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(1) 5 M. & W. 562.

(2) 2 Wms. Saund. 156.

(3) 1 H. & N. 189.

(4) Ibid. 194.

(5) 3 Beav. 383.

(6) 7 Bing. 735.

(7) 8th Ed. vol. i. p. 417,

(8) Law Rep. 9 Eq. 345.

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(1) 14 Ch. D. 351.

(2) 11 M. & W. 653.

(3) 3 Beav. 383.

London, should not enjoy the advantages of a resident banker because he happened to have been a partner in, or connected with, a bank established in the metropolis and not having branches in the provinces. On the other hand there are many trades which can be carried on by correspondence and by means of modern facilities of transit with such ease, and with such advantages both to trader and customer, that it would be difficult, if not impossible, to say what corner of the kingdom could not be well served from any other corner; and it is within the knowledge of all that many who from early associations or for some other reason prefer goods supplied at a particular place continue to deal with tradesmen there, notwithstanding that they have, from accident or chance, removed their home many miles away. Is there anything to prevent me from adopting the rule which is laid down by Lord Justice *Fry*, and which approves itself to my mind? True it is that in many cases the old rule is quoted and followed without a hint of disapproval, and the earlier authorities are treated as in full force and applicable to modern circumstances. An example of this class of cases is *Collins* v. *Locke* (1), already mentioned, which, being a decision of the Privy Council, is entitled to special respect, but though the judgment in that case was rested on *Horner* v. *Graves* (2), and other old authorities, it is explained to be based on consideration how the rule ought to be applied to a particular trade in a particular locality, or, in other words, how far the restraint in question could be treated as reasonable or otherwise, having regard to the protection required by the covenantees and the interests of the public. (See among other passages one on page 688.) In *Egerton* v. *Earl Brownlow* (3) the law was laid down as, having regard to the question under consideration, might be expected, in a broader manner. On page 87, Mr. Justice *Cresswell* states the rule to be that unreasonable contracts in restraint of trade violate the policy of the common law that trade shall not be restricted, and are therefore illegal. Mr. Baron *Parke's* remarks (4) are more favourable to strict adherence to the lines of the old cases, but Lord *St. Leonards* (5) dwells on the variable character of public policy, to which I have already called attention. I need not refer in detail to more of the authorities cited at the Bar, or to any of the additional authorities which I have myself consulted. The recent decisions in *America* as well as *England* are collected in Mr. *Frederick Pollock's* work on Contracts. He (1) states the doctrine of them as tending to be that the real question is in every case whether the restriction imposed is commensurate with the benefit conferred, and this is only another mode of expressing the test whether the contract is reasonable. The American doctrine which he states seems to be substantially the same. I have not thought it worth while to refer to the cases, but they will be found mentioned in *Story* on Equity Jurisprudence (2), and also in *Parsons* on Contracts (3). I prefer to any language used elsewhere that of Lord Justice *Fry* in the case above cited. In order to apply it to the particular case I must mention a few facts.

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(1) 4 App. Cas. 674.

(2) 7 Bing. 735.

(3) 4 H. L. C. 1.

(4) Ibid. 123.

(5) 4 H. L. C. 238.

The plaintiff, *Edward Albert Davies*, and the defendant, *James Davies*, who are brothers, formerly carried on business in partnership with their father, *Edward Davies*, as galvanizers and galvanized iron manufacturers. For the present purpose it will be sufficient to say that they had a place of business at *Wolverhampton* and another in *London*, and that the Defendant was an active member of the firm. Disputes arose, and a Chancery suit ensued. That suit was compromised. As a part of such compromise *James Davies* retired from the firm, on the terms of his receiving a large sum in payment for his share of capital and goodwill and entering into a covenant, which was first expressed in an agreement of the 15th of July, 1884, and afterwards introduced into a deed of the 11th of October, 1884, in the following language: "The said *James Davies* to retire wholly and absolutely from the partnership, and, so far as the law allows, from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as to either directly or indirectly affect the said *Edward Davies* and *Edward Albert Davies*." The preparation of the deed occupied much time and led to much discussion, especially about this particular clause. Mr. *Willcock*, the solicitor of the Defendant, who was examined as a witness in this case, foresaw the difficulty of construing the clause and endeavoured to persuade the parties to agree to something more clear and definite, even at a sacrifice of some other stipulation. Unfortunately his advice was not taken, and the foreseen result has occurred.

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(1) 4th Ed. p. 315.

(2) § 292.

(3) 6th Ed. part 2, chap. 3, sect. 11.

I hold it to be the result of the evidence that in the autumn of 1884 and when the deed was executed, it was known to all concerned that *James Davies* intended to engage again in trade, and in a trade at least closely connected with that of the old firm. In fact, he was as early as this negotiating arrangements with *W. S. Codner* for the partnership into which they soon afterwards entered; but I am not sure that this was known, and I am sure that he was not known to be contemplating an immediate breach of the covenant into which he entered. The business of the Defendant and *W. S. Codner* has for some time past been, and is now, carried on at 380, *Old Street*, in the county of *Middlesex*, and now also I am told elsewhere within the metropolitan area, and it has been advertised by them to be that of galvanized iron and hollow-ware manufacturers and merchants, the Defendant taking particular credit for having been formerly managing-partner of the old firm at *Wolverhampton*. This firm of *Davies, Codner, & Co.* sells the same goods as were formerly sold by the old firm and are now sold by the plaintiff company, their successors in business. It was urged that, irrespective of the meaning of the covenant, the Defendant has not broken it because he has not galvanized any goods, that his manufacture has been restricted to goods not galvanized, and that what he covenanted not to do was not to carry on the business of a galvanizer. The complete, though not the only, answer is that in numerous circulars and trade-lists he has stated that his firm does manufacture galvanized articles, and that he cannot avoid this by proving that he employs others to galvanize articles ordered of him, or be heard to say that he advertises himself as a manufacturer, when he is not one in fact, only to attract customers.

If the Plaintiffs had failed to prove this breach I must have held them to have proved that the Defendant has so traded, acted, or dealt as to affect them (the Plaintiffs) in their business. It is proved that the Defendant's firm has solicited orders from customers of the old firm in the neighbourhood of *Croydon* and elsewhere, and the only excuse given is that these were customers formerly obtained by *W. S. Codner*, who was agent for other firms besides the old firm, and was also a merchant on his own account. Such an excuse is idle, and requires no answer. I have no doubt that if compelled to do it by the invalidity of the first part of the covenant, I might treat the second as divisible from it, and separately, so as to entitle the Plaintiffs to relief on the ground of this latter breach. It is not contested that the Plaintiff company are entitled to sue as assignees of the covenant, and to claim an injunction if it ought to have been granted to the original covenantees.

There remains, therefore, only the question whether the covenant is valid or not, and on this two points are raised—first, that it is too vague for a Court of law to enforce; and, secondly, that it is bad as in restraint of trade. There is another question—whether the Plaintiffs are debarred from any relief to which they might otherwise have been entitled by conduct which, for want of a better word, was styled in the argument "acquiescence." I will deal with this question first, but I need not do so at any length. It would require cogent evidence of acquiescence, amounting in law to a release of right, and founded, of course, on complete knowledge, to defeat the claims of Plaintiffs suing on a covenant dated the 11th of October, 1884, and enforced by a writ issued the 4th of March, 1886. There is no evidence of this character. I pass over the illness and death of the father, which may or may not have interfered with negotiations between the parties or the distinct assertion by the Plaintiffs of their claim. Suffice it to say that during part of the interval between the date of the deed and the issue of the writ, and when the Plaintiffs or their predecessors in title knew enough of the Defendant's intention to be on their guard, negotiations were pending for a friendly settlement on some such terms as that the Defendant's firm should be at liberty to sell, and should undertake to sell goods manufactured by the Plaintiffs. I see no occasion to pursue these negotiations. They broke down, and within a reasonable time this action was commenced.

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Is the covenant too vague? If it is, the vagueness is due to the introduction of the words "so far as the law allows." I have no doubt that the covenant must be read as obliging *James Davies* to retire absolutely from the old firm, and in this qualified manner from the trade or business of the old firm, and I have to consider whether the qualification has or has not an intelligible meaning. I cannot compliment the framers of this covenant on the introduction of a new form, nor have I been able to find any guide to its meaning by reference to similar language used in settlements of leaseholds, copyholds, or heirlooms, according to uses of freeholds. I see, however, no reason why I should not construe it as meaning "to the full extent that the doctrines of English law as interpreted by the High Court or the Court of Appeal, or, in the last resort, the House of Lords, will allow a man to contract himself out of the privilege of engaging in a particular trade or business." The phrase is not a happy one, and I do not commend it as a precedent, but I cannot say that it is so vague that I cannot construe it.

I have already stated how, in my opinion, the law stands. I am not called upon to say, and I certainly am not prepared to say, what are the reasonable limits, as regards space, of a covenant in restraint of such trade as is in question here. I have only to decide whether those reasonable limits include the place in which, according to the evidence, the Defendant has been and is carrying on a business similar to that of the Plaintiffs, and I have no doubt that they do. The injunction asked is against trade in the county of *Middlesex*, and I do not wish to intimate a doubt whether, having regard to the nature of the trade and the evidence in respect to the extent of the business of the old firm, this would be reasonable; but as a matter of form it ought to go to restrain the Defendant, &c., from carrying on the business of a galvanized iron manufacturer or galvanizer (I take these words from the deed) at 380, *Old Street*. This will not, of course, directly prohibit him from carrying on business elsewhere in the county of *Middlesex*, or within reasonable limits beyond it, but equally of course, he will be summarily restrained if after this he continues or commences to do so. I think he must also be restrained, because this is likewise reasonable, from trading, acting, or dealing in any way so as to either directly or indirectly affect the Plaintiff company in their business of galvanized iron manufacturers or galvanizers, and this part of the injunction will operate without limit as regards space. The Plaintiffs are also entitled to damages which must form the subject of inquiry.

The costs must of course follow the event. But a recent case called my attention, by no means for the first time, to Order LXV., rule 9, which empowers the Court on special grounds to award a successful party costs on the higher scale. The case which I have mentioned was a patent case, and I acceded to the plaintiff's suggestion, which was not opposed, perhaps without the reflection which it deserved. That case is, of course, beyond recall, and I would not recall it if I could. I refer to it partly for the purpose of stating that I should not necessarily grant such an application again in a similar case, and partly because it has, as I have mentioned, induced me to look again closely at the rule, which presents some practical difficulties. I am now dealing with a case which is certainly a special one as regards its nature and importance. It necessarily occupied a considerable time, many witnesses were called, and the oral evidence was of a special character. It involves large questions of the highest importance to the parties concerned, and is important also to others. It was presented to the Court in such a manner that I have been able to discuss the real questions in issue without wasting time on oral or documentary evidence touching matters not really in dispute, or for some other reason not immediately relevant. Without wishing or intending the slightest injustice to counsel, who have rendered me invaluable assistance, I think that this is in great measure due to the way in which the case was prepared for trial on both sides, the labour and responsibility falling mainly on the Plaintiffs, and it seems to me to be essentially a case to which Order LXV., rule 9, applies. I therefore propose to direct that the costs subsequent to the reply shall be taxed on the higher scale. I see no reason for extending the direction beyond that date. I will of course hear Mr. *Barber* if he has anything to say on this point, for I wish to make it as little as possible a matter of discretion, and if the case is taken to the Court of Appeal I hope that Court will think itself at liberty to review my judgment on this point as well as others, and to lay down a rule for guidance in other like cases.

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From this decision the Defendant appealed. The appeal came on for hearing on the 1st of August, 1887.

Barber, Q.C., and *Cock*, Q.C. (*Russell Roberts*, with them), for the Appellant:—

The covenants to retire so far as the law allows from the trade or business, and not to trade, act, or deal in any way so as to either directly or indirectly affect *E. Davies* or *E. A. Davies* are covenants without any limit of time or space, and therefore bad as a general restraint of trade: *Mitchel* v. *Reynolds* (1); *Story's* Equity Jurisprudence (2). In the reporter's note to *Avery* v. *Langford* (3) there is a list of cases in which a restriction as to trade was held to be good, from *Mitchel* v. *Reynolds* in 1711 down to *Tallis* v. *Tallis* (4) in 1853, and in a note to *Pollock* on Contracts (5) the list of cases is continued down to *Rousillon* v. *Rousillon* (6) in 1880. Out of all these cases there are only three in which there was no limit as to space, namely, *Wallis* v. *Day* (7), which was a case of master and servant, *Leather Cloth Company* v. *Lorsont* (8), which was the case of a trade secret, and *Rousillon* v. *Rousillon*, in which it was held that the true test was reasonableness, and that in the particular circumstances the restriction of the covenant was not greater than was required for the protection of the covenantee. But the question of reasonableness does not arise unless there is some limit of space or time. If the covenant is unlimited the general rule is still applicable, because such unlimited restrictions are against public policy; *Hunlocke* v. *Blacklowe* (9); *Homer* v. *Ashford* (10); *Hitchcock* v. *Coker* (11); *Ward* v. *Byrne* (12); *Allsopp* v. *Wheatcroft* (13); *Collins* v. *Locke* (14); *Jones* v. *Lees* (15); *Pearson* v. *Pearson* (16).

(1) 1 P. Wms. 181.
(2) Ed. of 1839, vol. i., ch. 7, pl. 292.
(3) Kay, 663, 667.
(4) 1 E. & B. 391.
(5) 4th Ed. p. 316.
(6) 14 Ch. D. 351.
(7) 2 M. & W. 273.
(8) Law Rep. 9 Eq. 345.
(9) 2 Wms. Saund. 156.
(10) 3 Bing. 322, 326.
(11) 6 A. & E. 438.
(12) 5 M. & W. 548, 561.
(13) Law Rep. 15 Eq. 59.
(14) 4 App. Cas. 674.
(15) 1 H. & N. 189.
(16) 27 Ch. D. 145.

In the present case the words "so far as the law allows" import no limit at all. They only make the covenant vague as well as wide. It is impossible for the Court to enforce such a covenant. It is not the duty of the Court to make a contract for the parties. They ought to express definitely what they mean, and then the Court can decide whether it is valid.

Warmington, Q.C., and *C. Walker*, for the Plaintiffs:—

Assuming that as a general rule unlimited covenants for restraint of trade are invalid, we contend that the covenant in the present case is one which the Court will enforce. In the first place it is given on an assignment of the goodwill of the business and for valuable consideration, and is in confirmation of the covenant for quiet enjoyment, which is implied in the assignment. When the rule against covenants in restraint of trade was established there was no such thing known as goodwill: and this covenant must be interpreted with reference to its special object and the present state of circumstances. The rule has been modified already to a certain extent by permitting covenants limited as to space. If unlimited restraint of trade is against public policy, it is equally against public policy that assignors of a goodwill should not have adequate protection.

This covenant is not unlimited. It is expressly limited by the words "so far as the law allows." The meaning of this phrase is "subject to such reasonable limits of time and space as the law imposes," that is, such limits as are reasonably required to protect the covenantee. The form of the covenant was taken from an executory agreement, and the Court will give effect to it as such according to the true intention of the parties. As it stands it is not too vague for the Court to enforce. When any breach of the covenant is complained of, a judge or jury will have no difficulty in deciding whether the alleged breach has been within the reasonable limit. In the present case it would probably be held to refer to any place where the firm had been carrying on the trade, and would be confined to the lifetime of the covenantee. Covenants in marriage settlements to settle property so long as the rules of law will allow have always been held good. Why should not this covenant be equally valid?

The rule against covenants in restraint of trade being based on public policy must vary from time to time, and the state of society and the facilities of communication vary: *Egerton* v. *Earl Brownlow* (1). Notwithstanding some of the old cases, the principle by which the Court in modern times is guided is the reasonableness of the covenant, and that reasonableness has reference to what is necessary for the protection of the covenantee; and if a covenant unlimited as to space is shewn to be necessary for his protection the Court will consider it reasonable: *Homer* v. *Ashford* (2); *Mitchel* v. *Reynolds* (3); *Hitchcock* v. *Coker* (4); *Archer* v. *Marsh* (5); *Whittaker* v. *Howe* (6); *Leather Cloth Company* v. *Lorsont* (7); *Rousillon* v. *Rousillon* (8).

With respect to the latter part of the covenant, in which the covenantee agrees not to trade, act, or deal in any way so as to either directly or indirectly affect his former partners, it must be construed by reference to the subject-matter, namely, trade competition. The covenant may be severed and the Defendants may be restrained from exercising any trade so as "directly" to interfere with the Plaintiffs: *Pigot's Case* (9); *Mallan* v. *May* (10); *Price* v. *Green* (11); *Baines* v. *Geary* (12). There is nothing unreasonable in such a covenant for the protection of the assignor of a goodwill; and it may be sued on by the assignees of the covenantee: *Jacoby* v. *Whitmore* (13).

Barber, in reply:—

The last clause of the covenant is still more vague than the first. It is impossible to say what act "affects" the Plaintiffs. The Court could not enforce it, nor could any damages be assessed for the breach of it. It is, moreover, a personal covenant, and cannot be sued on by their assignees.

THE COURT, before giving judgment, offered to the counsel for the Respondents the opportunity of rearguing the question whether

(1) 4 H. L. C. 1.
(2) 3 Bing. 322.
(3) 1 P. Wms. 181.
(4) 6 A. & E. 438.
(5) Ibid. 959.
(6) 3 Beav. 383.
(7) Law Rep. 9 Eq. 345.
(8) 14 Ch. D. 351.
(9) 11 Rep. 26 b.
(10) 11 M. & W. 653.
(11) 16 M. & W. 346.
(12) 35 Ch. D. 154.
(13) 32 W. R. 18.

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an absolute unlimited covenant not to exercise a particular trade was necessarily invalid.

1887. Aug. 5. *Warmington*, Q.C. (*C. Walker* with him), for the Respondents:—

The rule that an absolute covenant in restraint of trade is necessarily invalid was based on public policy, and therefore must yield to changing circumstances. Since the decision in *Hitchcock* v. *Coker* (1) the rule has not been strictly adhered to, but a measure has been introduced by which to test the validity of the covenant, namely, the reasonableness of the covenant with respect to the necessary protection of the covenantor who has given valuable consideration. It is impossible that there should be a fixed rule as to distance, any more than as to time. An absolute covenant not to trade has been held to mean not to trade in *England*. When the rule was established *England* had no colonies, and such a covenant would operate as an absolute restriction of trade, but now it would have no such effect. There is nothing now against public policy in a man being restrained from a particular trade within *England* during the lives of the parties. He can trade in *Ireland* and the colonies. The limit of the lives of the parties is sufficient limitation. The sale of goodwills also has been of recent introduction. All this shews that reasonableness is now the only rule by which these covenants ought to be judged, and there is an increasing tendancy in modern decisions to adopt that view: *Ward* v. *Byrne* (2); *Whittaker* v. *Howe* (3); *Elves* v. *Crofts* (4); *Tallis* v. *Tallis* (5); *Leather Cloth Company* v. *Lorsont* (6); *Rousillon* v. *Rousillon* (7).

Cock, Q.C., for the Appellant, in reply:—

Whatever arguments may be adduced as to public policy in the changed condition of things in this country, it is clear that the old rule against absolute covenants in restraint of trade still remains in force. In *Collins* v. *Locke* (8) the rule is stated as

(1) 6 A. & E. 438.
(2) 5 M. & W. 548.
(3) 3 Beav. 383.
(4) 10 C. B. 241.
(5) 1 E. & B. 391.
(6) Law Rep. 9 Eq. 345.
(7) 14 Ch. D. 351.
(8) 4 App. Cas. 674.

still existing. So also in *Ward* v. *Byrne* (1), *Hinde* v. *Gray* (2), *Avery* v. *Langford* (3), and the cases there collected, *Archer* v. *Marsh* (4). *Whittaker* v. *Howe* (5) was decided under a misapprehension of the previous authorities. *Leather Cloth Company* v. *Lorsont* (6) was the first case in which a wider rule was suggested, but the words "natural and not unreasonable" used by Lord Justice *James* in that case are not found in any previous case. There is no authority for saying that a limit of time is sufficient, there must be a limit of distance. If there is such a limit, the Court will decide whether it is reasonable. If there is none at all, the covenant is void.

1887. Aug. 9. COTTON, L.J.:—

This is an appeal by the Defendant against a judgment of Mr. Justice *Kekewich*, which enforced by injunction a covenant contained in a deed which was executed by the Defendant shortly after he separated from his father and his half-brother, who is one of the Plaintiffs, on the dissolution of the partnership, the Defendant assigning to them all his interest in the business including the goodwill of the business. The other Plaintiff is the company which has bought from the co-Plaintiff, the half-brother of the Defendant.

It was argued that it was a question of considerable importance, and so I think it is; and there are many questions which arise as to whether we ought to enforce or can enforce a covenant like that which is contained in the present deed; I need not refer to anything else than the deed, and I simply take the covenant, which is in this form. It is a deed in which both parties covenant one with the other, and then there follow the covenants applicable to each. The particular covenant on which the Defendant is sued, and which is his covenant, is this:—"*James Davies* to retire wholly and absolutely from the partnership, and so far as the law allows from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as to either directly or indirectly affect the said *Edward Davies*" (that is his father) "and *Edward Albert Davies*" (that is his half-brother).

(1) 5 M. & W. 548.

(2) 1 Man. & G. 195.

(3) Kay, 663.

(4) 6 A. & E. 959.

(5) 3 Beav. 383.

(6) Law Rep. 9 Eq. 345, 354.

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Now, of course, there is no difficulty about the covenant to retire absolutely from the partnership; but what follows is the point on which the first question arises, and, as I understand, it is substantially the branch of the covenant in consequence of which Mr. Justice *Kekewich* granted the injunction. I should state that the partnership having been carrying on business partly in *London* and partly at *Wolverhampton* the Defendant shortly after the dissolution joined one who had been formerly connected in business with the partnership, and proposed to start a business somewhere in *London*. The injunction was to restrain him from carrying on business there; not defining what place would or would not be within the covenant, but to restrain him from carrying on business there, and also restraining him from acting in violation of the second branch of the covenant—the words being: "that he be restrained from carrying on the business of galvanized iron manufacturers at 380, *Old Street*, in the county of *Middlesex*, and also from trading, acting, or dealing in any way so as either directly or indirectly to affect the Plaintiff *Edward Albert Davies* or the company in such business."

I will deal first with the first portion of the covenant on which, as I understand, Mr. Justice *Kekewich* has acted, and I must say that there is an example here which ought not to be followed. Where parties have entered into an agreement to execute a deed to contain certain covenants they ought certainly to work out their agreement, and not to come to the Court simply to construe what was intended to be an executory agreement. For what we have here is this—the Court is not asked to order performance of this which was an agreement originally by directing a proper deed to be executed; but we have to decide a question of construction: to say what is the proper effect of this covenant, and for my part I should decline when the matter comes before us in this way to treat it as executory and to see how, and in what way, the Court would direct an agreement with these words in it to be construed. But that is not the ground on which I intend to decide this case. Is this covenant one which the law will allow? That is the point I intend to take. It is said that this is a contract to retire from the trade or business in all its branches if and so far as the law allows. Now, in my opinion, if that is the covenant, the law does not allow it; because if that is so, it is an absolute covenant to retire from this trade or business, that is to say it is an absolute restraint upon the Defendant during his lifetime from carrying on anywhere within *England* the business in which he was engaged. Mr. Justice *Kekewich* held that in consequence of the change of circumstances which now exist in *England*, the old rule, which was laid down from very early times, that covenants in restraint of trade are bad, was no longer to be considered as the law of the Court, and, after the discussion which has taken place, and with my view of this covenant, we must consider that question.

Now that that was the old law is undoubted; and in the year books in *Henry* V.'s reign there was a case which laid down generally that covenants in restraint of trade are bad (1); that it is contrary to public policy and contrary to the interests of the public that any man should be restrained from carrying on an honest business for the best of his own advantage and for the best of the advantage of the public; that was originally so said, but undoubtedly to some extent that has been modified; and in the first instance it was modified in this way, that partial restraints might be good. Even when that was established, it was, first of all, said that the Court must, when it is asked to enforce such a covenant, see whether the consideration was sufficient. Now that is gone; because if there is valuable consideration then the Court will not consider, but will leave the parties to consider, whether that consideration is or is not sufficient. Then the Courts have done this. Where there has been a partial restraint only, the Court has gone into the consideration as to whether that is reasonable; namely whether it is reasonably required for the protection of the party with whom the covenant is entered into. Well, then, has it gone further than that? It is said that there are cases which have laid down that the only thing to be considered in judging whether these covenants can be enforced or not, and whether they are valid or not (for it is not only a question of equity) is to see whether they are reasonable.

Mr. *Warmington* contended that the reasonableness required had reference to what was reasonably necessary for the protection of the covenantee; and it is very probable that the first rule which I mentioned, that absolute covenants in restraint of trade are bad, was established on the ground that they are not reasonable; and in that sense it may be that what we have to consider is whether they are reasonable. But in my opinion if we look at the cases on which Mr. *Warmington* relied, there is this to be observed, that where there has been a limited restraint, and a limited restraint only, then the Court has considered, with reference to the validity of that covenant, whether though the restraint is limited, the restraint is reasonable; and of course that must come in even stating the rule as I have endeavoured to do, namely, that an absolute restraint is bad, but that a limited restraint may be good, provided the restraint is reasonable only, and such as was required for the protection of the person with whom the covenant is entered into. If one looks and sees what are the authorities which have been referred to by Mr. *Warmington* in argument, I think it will be found that they really are cases where the Judges, though admitting the general rule and sometimes doing so expressly, have considered, as regards a partial covenant which was before them, whether the case was one in which the restraint was reasonable.

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(1) 2 Hen. 5, Term. Pasch. pl. 26.

I think the first case to which he referred was *Hitchcock* v. *Coker* (1). That case got rid of the rule of inquiring into the sufficiency of the consideration, but in other respects it deals with the question whether the particular restraint in that case was reasonable or not. That case was twice considered, once before the Divisional Court and then again in the Exchequer Chamber. There the covenant was of the most limited description because it purported to restrain the defendant from carrying on his business at *Taunton* or within three miles thereof. It was most limited as regards space, and therefore the observations of the Judges which are relied on must be considered with reference to that covenant, and not generally with reference to covenants which are not so limited. What Chief Justice *Tindal* says is this (2): "We cannot, therefore, hold the agreement in this case to be void, merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable

(1) 6 A. & E. 438.

(2) 6 A. & E. 456.

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restriction." That I think introduced what I may here mention, that undoubtedly now, if a covenant is in any way limited, either sufficiently as regards space, or sufficiently as regards time, then it will not be considered as an absolute restraint of trade, but only a limited restraint, and then the question as to whether that limit is reasonable will come into consideration.

Now that case was decided in the year 1837, and to my mind it shewed no departure at all from the old rule unless it was a departure from the old principle of considering the sufficiency of the consideration.

I will not go through all the cases, but we find afterwards *Mallan* v. *May* (1), and there we have the rule laid down, as I understand it, most clearly by Baron *Parke.* What he says is this (2) (and this was in the year 1843): "The rule as laid down by Lord *Macclesfield* and Lord Chief Justice *Willes,* is, that total restraints of trade, which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad." That I think has been modified to this extent, that the presumption is not that such a covenant is bad, but it is rather for the Court to consider whether on the facts it is or is not bad. Then he proceeds, "But if the circumstances are set forth, that presumption may be excluded, and the Court are to judge of those circumstances, and determine whether the contract be valid or not." Then he quotes *Mitchel* v. *Reynolds* (3), and he quotes it undoubtedly not as his own opinion, but as expressing the rule that is laid down by earlier Judges—he does not in any way deal with it as a rule which is departed from, although there had been a very great alteration in the circumstances of the kingdom between the year 1843 and the time when *Mitchel* v. *Reynolds* was decided. Then Baron *Parke* goes on, and says this: "Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced." And that is what he was considering when he entered into the question as to whether or not in that particular case the restriction was reasonable or not.

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(1) 11 M. & W. 653.

(2) 11 M. & W. 664.

(3) 1 P. Wms. 196.

I have passed over several cases in which there have been these considerations, but all of them are cases where there was a partial restraint to be dealt with, and the Judges were applying their minds, not to the general rule, but to the rule as applicable to restraints so limited.

But then it is said, that not only are there these expressions of opinion, which I think in their application were misunderstood, but that there is authority which now leads to the conclusion that the old rule is gone, and is a thing of the past. Now what were those cases? I will take them in chronological order, because I think that is probably the best way of dealing with them. *Whittaker* v. *Howe* (1), before Lord *Langdale*, was first in date, and undoubtedly that was a strong case, because it was an absolute covenant to restrain a solicitor from practising within the kingdom for a period of twenty years. I doubt myself whether the time was not so large there that it ought not to be considered as a limited covenant. It was treated by Lord *Langdale* and considered by him as a covenant limited, and therefore it was open to him to consider whether the limit was a reasonable one. He held that it was, but that does not shew a departure from the general rule.

The next case is that before Lord Justice *James* when Vice-Chancellor: the *Leather Cloth Company* v. *Lorsont* (2). That undoubtedly was a strong case, having regard only to the expressions used by the learned Judge when he decided the case; but in fact what really was in contest there was a contract as to the divulging of a trade secret, and the covenant not to carry on the trade was only connected with and in order to give effect to the contract not to divulge the trade secret, and although he does make general observations in his judgment, yet in my opinion the case must be considered, so far as it is a decision, a decision only on a contract applicable to a trade secret, and not to a covenant generally in restraint or in prohibition of trade. I find that Vice-Chancellor *Wickens*, in *Allsopp* v. *Wheatcroft* (3), treats that case before Vice-Chancellor *James* as being

(1) 3 Beav. 383. (2) Law Rep. 9 Eq. 345. (3) Law Rep. 15 Eq. 59.

the case of a trade secret, and not as an ordinary case of a covenant to restrain trade. What he says is this (1): "No doubt, in the case of the *Leather Cloth Company* v. *Lorsont* (2), Lord Justice (then Vice-Chancellor) *James* threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area; but there were expressions in the instrument in that case limiting the generality of the covenant, and it was in substance a case of a different class from this, since the restriction against trading was only a consequence of a clearly lawful restriction against divulging a trade secret. In this point of view it may probably be thought to bear some analogy to *Wallis* v. *Day* (3). Assenting, as I do, to everything that was said in *Leather Cloth Company* v. *Lorsont,* I can hardly treat it as authorizing me to depart from the recognised rule as to limitation of space in a case so different from it as the present is, and unless that rule be departed from the covenant here is clearly bad." There Vice-Chancellor *Wickens,* on whose opinion I lay great store, not only treats it as I do, but what is probably more important, he treats the old rule in the year 1872 as still subsisting, and as the law of the Court. I may observe here with reference to that observation of his that the covenant was limited, that it really was limited to the period during which certain patents, the right to obtain which throughout *Europe* was granted to the plaintiff, were to last; and it may be that it was limited in time, though not in space, in such a way as to make it a limited and not a general covenant. With the greatest respect to the late Lord Justice *James,* if he intended to express his opinion that the cases had authorized him to say that, on the ground of policy, the old rule had been departed from, I think he could not have sufficiently considered what that was to which the observations of the Judges, relied on by Mr. *Warmington,* were addressed—namely, not to the general question as to whether the absolute covenants were good, but to the question whether limited covenants were in the particular cases good. It is clear that Vice-Chancellor *Wickens* was not aware that the old rule had been departed from, and his view is

(1) Law Rep. 15 Eq. 64.
(2) Law Rep. 9 Eq. 345.
(3) 2 M. & W. 273.

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confirmed by what was said in *Collins* v. *Locke* (1) by Sir *Montague Smith* when giving the decision of the Privy Council; because what he says is this: "Numerous cases which have been decided on this subject" (covenants in restraint of trade) "are collected in the notes to *Mitchel* v. *Reynolds* (2). It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration and are reasonable." He clearly, therefore, lays down the two things that are necessary: they must not be unlimited; and then, also, if they are limited, there is the further question to be considered, namely, whether, even having regard to the limit, they are reasonable; and in my opinion that old law, notwithstanding the opinion of Mr. Justice *Kekewich* of the change which has taken place in the country, still ought to be recognised and regarded by us as the law, and ought not to be departed from by us. If any one is to do it, it must not be this Court, but the House of Lords.

Then if that be so, and the covenant bears the construction which at one time was contended for by Mr. *Warmington*, in my opinion the covenant is bad, because the law does not allow an absolute covenant to give up trade. I need not go into the reasons why that is so, but there are plenty of reasons for it. No man ought to be prevented during his life from earning his livelihood by carrying on his trade; and the public ought not to be prevented from the benefit which they may get from a man who is skilled in a trade carrying on that trade.

There is one other case which I have omitted to mention in its regular order, but I was diverted from it by that case before Vice-Chancellor *Wickens* and the Privy Council case. I refer to the case which was decided by Lord Justice *Fry*. I think undoubtedly he used expressions which shewed that he took a somewhat wider view than I do of the law—a looser view perhaps I may say without disrespect. In that case of *Rousillon* v. *Rousillon* (3) there was the limit of time which might have made the covenant a limited one and not a general covenant in absolute restraint of trade; and if so, it comes within what I think is

(1) 4 App. Cas. 686. (2) 1 P. Wms. 181; S. C., 1 Sm. L. C. 6th Ed. p. 356.
(3) 14 Ch. D. 351.

now the true rule, that where there is a limited covenant you have to consider how far, having regard to the particular circumstances of the case, the limit is a reasonable one. About that case I say no more after what I have said on the cases generally.

Then it was said here that this is not a general covenant but "so far as the law allows." What Mr. *Warmington* said in that part of his argument was: "It is a covenant not to carry on trade within such limits of time and space as the law will consider reasonable." Now construing it in that way, which I hardly think is the right construction, it is a covenant which the Court in my opinion ought not to enforce. If parties wish to ask the Court to assist them in restraining those with whom they are dealing from breaking a limited covenant against carrying on a trade they must, in my opinion, themselves fix the limits within which there is to be no carrying on of the trade, and then they do it at their peril. The law will determine whether that limit is a good one, or whether it is one which is so unreasonable that the covenant must fail. It is entirely different from the covenant to settle property in a certain line or family "so long as the rules of law and equity will allow." There are certain definite rules laid down as regards the limitation of property which will prevent it from being so settled as to exceed the rules against perpetuities, and those are definite fixed rules. There is no definite fixed rule as to the limits within which trade can be restrained. That must depend upon the circumstances of each case; and in my opinion it is wrong to make a covenant in this form, and wrong for the Court to enforce it, because one sees at once what difficulties will arise if an injunction is granted. Mr. Justice *Kekewich* has said that carrying on business at *Old Street* in the county of *Middlesex* is within reasonable limits, but he has not defined what else will be so, and are we again and again to have this question to arise on the covenant, where the parties have left the covenant entirely indefinite and have sought to get the Court, without risking the validity of their covenant, from time to time, to say whether a particular space and a particular time is within the limits? In my opinion if one looks at it in that, which is the modified form, the answer to it is this:

there are no limits fixed by law which can be regarded as introduced into this covenant. A covenant in this form, indefinite as it is in my opinion, is one which neither a Court of Equity nor a Court of Law ought to enforce. The parties must make up their minds to say what they agree to as regards the limits of time or space within which there is to be no trading.

Then, one comes to the second branch of the covenant, on which Mr. Justice *Kekewich* to some extent acted, though, as I understand his judgment, he principally relied on that which I have been already discussing. This is the stipulation, "not to trade, act, or deal in any way so as to either directly or indirectly affect *Edward Davies* and *Edward Albert Davies*." Mr. *Barber* did not argue the point, because he thought it was covered by a previous decision of the Court of Appeal (1), but in my opinion there is one great objection to enforcing this covenant, that I do not think it is a covenant the benefit of which would pass with the goodwill to the purchasers, the company. The case to which he referred was a case where there was a contract not to trade within certain limits. That was evidently a covenant in order to protect the business and the goodwill of it, and therefore it was one which would pass with the goodwill to a purchaser of the goodwill; but there is no such absolute covenant here, and, to my mind, it is a covenant which points to the personal benefit of the father and of the half-brother rather than to any protection of the goodwill. So far as the parties intended the goodwill was defended by the previous covenant in restraint of trade, which in my opinion was an invalid covenant; and this could not be intended as an addition to that which in their minds was absolutely provided for, but as something which the son should covenant for the benefit of his father and half-brother personally, and not that which was to affect the trade which he had parted with to them. In my opinion, having regard to the great indefiniteness of this covenant, and to the fact that it is not one which the purchasers from the surviving son would be entitled to say passed to them with the goodwill, no relief ought to be granted on that branch of the covenant either. In my opinion therefore the action fails and ought to be dismissed.

(1) *Jacoby* v. *Whitmore*, 32 W. R. 18.

BOWEN, L.J.:—

We are asked to enforce the covenant which the Lord Justice has read, which divides itself into three parts, the first part is an agreement that *James Davies* is to retire wholly and absolutely from the partnership; the second, that so far as the law allows he shall retire (I incorporate the words "he shall retire" from the previous section), or else that he shall undertake to retire (because it is immaterial to my argument which of these readings is adopted) from the trade or business thereof in all its branches; and the third part of the covenant provides that he is not to trade, act, or deal in any way so as to either directly or indirectly affect *Edward Davies* or *Edward Albert Davies*.

Now with regard to the first part, that he shall retire from the partnership, there is no question that that is both a covenant which may be made lawfully and that it has been performed in the present instance. The difficulty arises with regard to the two further parts of the covenant which I have endeavoured to divide; and I will take them separately. First, with regard to the provision that "so far as the law allows he shall retire, or undertake to retire, from the trade or business thereof in all its branches," at first sight that would appear—and I think it must be—equivalent to a covenant either to retire absolutely from the trade altogether, if the law allows such a covenant to be made, or, if the law does not allow such a covenant to be made, it must be a covenant to undertake to retire from the trade so far as the law permits of such an undertaking. If it is to be construed in the first of those two ways, a covenant absolutely to retire altogether from the trade or business, it seems to me to be against the Common Law, for this reason. The principle of the Common Law that covenants in restraint of trade which are unlimited altogether, whether in space or time, is that such covenants are void. They cannot be enforced. That was laid down as long ago as the Year Book of 2 Hen. 5, which was followed in the reign of *Elizabeth*, and which is alluded to in the *Ipswich Tailors' Case* (1). This is what the Court says in the *Ipswich Tailors' Case*: that at the Common Law no man could be prohibited from working in any lawful trade, for these reasons, that it is according to the wish of

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(1) 11 Rep. 54a.

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the law that all should learn and practise lawful trades and sciences which are profitable to the commonwealth, and therefore the Common Law abhors all monopolies which prohibit any from working in any lawful trade. Then the Court proceeds to consider the case in 2 Hen. 5, and they say that for the same reason if a husbandman is bound that he shall not sow his land the bond is against the Common Law, and that the statute of *Elizabeth*, which prohibits every person from using or exercising crafts or occupations until they have been apprenticed, was enacted, not with the intent of preventing trade, but with the intent of encouraging education in trade. "Therefore," says the Court, "it appears that without an Act of Parliament none can be in any manner restrained from working in any lawful trade." That language, of course, must be taken with reference to the subject-matter, but still I use it as shewing that broadly the law sets its face, subject to exceptions which I shall have to consider, against restraints of trade. That is laid down in *Mitchel* v. *Reynolds* (1), a case which may be said to be the foundation of the recent decisions upon the point.

Now there may be limitations to be found in the covenants on the strength of which it is sought to escape from this general doctrine. There may be such limits in time, and it has also been the view of the Courts that a limit in time is not indispensable in order to enable the covenant to be enforced where there is some other limit to be found which makes the covenant reasonable and necessary for the protection of the party who seeks to protect himself, and those cases I need not discuss further. Then we come to another limit, which may be found, a limit in space—and as yet I think that there has been no decision that you may have a covenant unlimited in space altogether unless in the case of special limits which form the third class of limit—the limit which is to be found in the special character of the subject-matter which is sought to be protected. The last, or third kind of limit, is a kind of limit which I think Vice-Chancellor *James* thought he had found in the case of *Leather Cloth Company* v. *Lorsont* (2), though in that case also, as the Lord Justice has pointed out, there may also have been found a limitation in time.

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(1) 1 P. Wms. 181.

(2) Law Rep. 9 Eq. 345.

Now we have been asked by Mr. *Warmington*, in an extremely able argument, first of all, to hold that limitation in space is not necessary if you can find that protection through an unlimited area of space is reasonably necessary for the security of the covenantee. But Mr. *Warmington* has not confined himself to that minor proposition: he has also gone further, and asked us to consider generally whether the state of circumstances, the change in the character of the business of the world, the extension of the means of intercourse between one part of the kingdom and another and one part of the world and another, has not shaken to its core the original doctrine that covenants unlimited altogether ought not to be enforced. It appears to me that if there is to be any change made in the principle of the Common Law, to which I have alluded, and which has remained unassailed for centuries, it would better come from the House of Lords than from ourselves; but if there is to be an exception engrafted on the rule, or the rule is to be modified with reference to the requirements of modern society, as to which I will for the moment express no opinion, it can only be if the case in question ranges itself under one of two heads: either that the covenant, in its unrestricted form, was one which was a benefit to the public, in which case it might be said that that would destroy the reason for insisting on the old rule, which was derived from the public policy of the kingdom; or, secondly, if it was reasonably necessary for the protection of the covenantee. In the present case it seems to me that we have got no materials upon which we can, without leaping in the dark, assume that the present covenant is a benefit to the public, for there is nothing, to my mind, which shews that the public would be benefited by allowing such a covenant as this in this case to be enforced, nor have we the materials for deciding that such a covenant is reasonably necessary even for the protection of the covenantee. It appears therefore to me that it is not necessary in the present case to consider or to decide whether what I have called the old doctrine of the Common Law, that covenants absolutely unlimited both in space and in time ought to be modified, having regard to the altered character of the commercial intercourse of the world. We ought to leave that to be discussed on an occasion when the facts really raise the point. For the same reason it appears to me that we are not bound in the present instance to decide even that an absence of limit as to space may be excused or may be excepted if it is reasonably necessary for the protection of the covenantee, because there is nothing here which shews that it was reasonably necessary for the protection of the covenantee. For that reason, without denying that I have an inclination to think that the rule of the Common Law is too much ingrained in our history to be changed at this moment, at all events except by the highest Court in the country, I do not decide it, because it seems to me the materials do not enable us to decide it. If, therefore, the part of the covenant which I am now discussing, which is that *James Davies* is to retire so far as the law allows from the trade or business in all its branches, is to be interpreted as meaning an absolute covenant, and we are asked to hold that the law will allow in such a case such a covenant to be made, I say there are no materials here to which we could attempt to apply the modification of the general principle which Mr. *Warmington* asks us to accept of the old rule of the Common Law.

But then if we are to read on the other hand this branch of the covenant as something short of that—if it only means that the covenant in restraint of trade is not to be unlimited, but that the limit is to be found by an appeal to the law, then it seems to me that the obvious answer is that that covenant is too vague for us to deal with. I think myself it would have been too vague even if it had remained in the nature of an executory contract to execute a deed in that shape. The parties would still be asking the law to do for them what they had not made up their minds about themselves. In fact they would be asking the law to make a contract instead of making a contract themselves. But in any view it seems to me that this is too vague. It is said that this is a covenant that *James Davies* will retire so far as the law allows, and that we are to ask the law what is to be the restraint imposed upon the generality of the covenant. The law is absolutely incapable of answering a question so put. It is perfectly true that in many contracts where you want a measure to be applied to a particular subject-matter, you leave the measure to be supplied by reason. There is many a contract for example which, instead of fixing the particular time for payment, provides that the time is to be fixed by what is reasonable in the trade or in the business. In those cases you introduce the consideration of what measure reason will apply, because the measure which reason will apply tends towards certainty, and therefore enables you to make up for the absence of distinctness on the part of the contract by reference to a standard which the parties had in their minds, though they did not express it on paper, namely, the standard of reason. But in the present case what we are in search of is some definition which would limit what otherwise is a pure negative. In such a case as that you cannot invoke reason to put a limit upon a mere negative. You cannot get a measure out of it at all, and whatever reason says about it you remain still in want of the definition which is necessary to make the covenant a restricted one. The most obvious proof of the truth of that proposition is to recall to one's mind this, that, supposing the law will allow certain restrictions, there may be twenty different restrictions, all of which might serve the purpose of the parties; all of which would be absolutely inconsistent with each other; all of which the law would allow. How are we to know which of those particular restrictions the parties intended to impose? They leave it absolutely uncertain, and for the best of all reasons, because they had not made up their own minds. Therefore to ask us to apply reason at this particular point, is to ask us to condescend upon some one of the twenty possible alternatives, though the parties themselves could not make up their minds which one they would take. A contract to do nothing that is unreasonable contains in itself no limitation, because there may be a hundred different reasonable courses, all of which are inconsistent with one another. The law of *England* allows a man to contract for his labour, or allows him to place himself in the service of a master, but it does not allow him to attach to his contract of service any servile incidents—any elements of servitude as distinguished from service. What sort of position would a contracting party place the Court in who made this sort of contract for himself, "I will undertake to serve you in every possible way which the law does not consider repugnant to the doctrine that servile incidents are not to be imposed upon a party?" That is too vague. It gives you no

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sort of measure of service. In the same way, contracts in restraint of marriage are void except in certain specified cases, where, for instance, a definite period is imposed for the sake of the health of one of the parties. How could a man contract that he never would marry subject always to such limitations as the law imposed? It would leave the contract absolutely vague. You would not know what he meant. For the same reason if you read this contract in the secondary sense, as an attempt to make a contract in partial restraint of trade, the answer is, we do not know what the parties mean. On that ground it seems to me that that part of the contract cannot be enforced.

Then we come, lastly, to the third branch of the covenant, that *James Davies* is "not to trade, act, or deal in any way so as to either directly or indirectly affect"—whom?—*Edward Davies* and *Edward Albert Davies*." I doubt myself if that contract is not in restraint of trade—if it is not an absolutely unrestricted covenant in restraint of trade in one view put upon it; and if so I think it is bad for the same reason as I said before with regard to the earlier branch of the covenant. But, to read it in a less offensive or less rigid way, suppose it to mean "not to trade, act, or deal in any way so as to affect *Edward Davies* and *Edward Albert Davies* in their business"; it is a covenant that seems to me to be personal to *Edward Davies* and *Edward Albert Davies*, and cannot be assigned. It is perfectly true that there is a class of covenant in restraint of trade which would affect established businesses which can be assigned. For instance, a covenant not to carry on business in a particular street or in a particular town, may pass by assignment to the assignee of the business, but if the contract in its nature, on its true construction, is a personal one, then it cannot be assigned. The rule of law is plain, you cannot assign the benefit of covenants which are purely personal. I think this a purely personal covenant, and it cannot, therefore, be assigned and cannot be enforced by the present Plaintiffs.

On these grounds it seems to me, with regret, that we must differ from Mr. Justice *Kekewich*. As I said before, as far as I am concerned, I leave undiscussed and unsettled the great question as to how far modern changes in commerce affect the old doctrine of the Common Law.

FRY, L.J.:—

In this case we are called upon to enforce by way of injunction and by assessment of damages a covenant contained in an executed contract. We have not before us an agreement which is intended to be afterwards developed into a deed, but we have a solemn and formal deed executed between the parties which contains this covenant. We are told (and I have no doubt with perfect truth) that the history of it is this—that the formal covenant which we have to construe was part of an earlier executory and informal contract, and that the parties to it not being able to develop that contract satisfactorily between themselves inserted in the formal instrument the very words which they had used in the informal one. That does not enable us to construe the covenant in any manner other than as a formal and an executed contract.

The covenant consists of three parts. It is, first, that *James Davies* is to retire wholly and absolutely from the partnership. With regard to that, no question arises. Secondly, *James Davies* is to retire (for thus I read it) so far as the law allows, from the trade or business thereof (that is, of the partnership) in all its branches; and thirdly, *James Davies* is not to trade, act, or deal in any way so as to either directly or indirectly affect *Edward Davies* and *Edward Albert Davies*. I deal first with the second branch of that covenant—that *James Davies* will so far as the law allows retire from the trade and business of the partnership in all its branches. I think that covenant is too vague to be enforced. I think the object of the contracting parties was to leave the law to make the contract between them. I think that it is the function of the Courts of Law to interpret contracts; to say whether a contract is or is not reasonable, to say whether it is or is not void, but that it is not the duty of the Courts to make contracts between parties. Whether the words would be capable of development if the Court had directed an instrument to be executed to carry them into effect is a point upon which I need not express any decided opinion. I entertain the greatest doubt whether the Court could possibly be called upon to interpret such words. The reason why I come to the conclusion I have stated is this: that whatever else may be in doubt about contracts in restraint of trade this is plain and undisputed—that no contract in restraint of trade which is unreasonable, which is larger than is necessary to protect the interests of contracting parties, is good. Now, it appears to me that there may be a hundred forms of contract, each of which might be reasonable, and might therefore be good, but that the law cannot select which of those hundred is to be the contract between the parties. Let me assume for one moment (as is probably the case) that it is necessary in order to make this contract reasonable that there should be some limit in space. Is *Wales* to be left out, or the eastern counties, or the southern counties, or the northern counties? No human being can tell. That is a matter which ought to have been settled between the contracting parties. So, again, if a limit of time be necessary in order to make the contract reasonable, the Court cannot lay down what length of time is requisite. When the parties to the contract have settled all those matters between themselves, then the Court can attend to the suggestions of those who say that looking at all the particulars of the contract the contract is or is not unreasonable. I repeat that the substance of the document seems to me to throw upon the Court the making of the contract between the parties. For that reason I think it is too vague to be enforced.

I have come to the conclusion which I have stated without reference to the larger question which has been so much debated in the course of this argument, but which in my judgment does not require adjudication from us on the present occasion. Therefore, I shall not express any decided opinion upon it. I think, however, that it is not unreasonable that I should add, that the inclination of my mind is still in the direction in which it was when I decided the case of *Rousillon* v. *Rousillon* (1). I think that the law with regard to public policy is one of a very different description from the law which is laid down in absolute terms for all time. It would be strange, and I think it would be unreasonable, if a contract which might now be for the public benefit, were held to be void because in the reign of *Henry* V., or in the reign of *Elizabeth*, that contract was contrary to public policy. It is impossible to look at the history of the law and not to see that contracts which at one time were deemed—and I dare say justly deemed—to be contrary to public policy, at another time have been deemed to be consistent with public policy, and for the public benefit. A forcible illustration of that fact is furnished by the very case which is the foundation of this branch of the law, the case in 2 Hen. 5 (1), which excited the indignation of Mr. Justice *Hull*, in a manner which has made his name immortal in the books. As has been pointed out by Lord *St. Leonards*, the general principle that a contract in restraint of trade which is unreasonable is void, is still the law; but the particular conclusion at which the Judge arrived—that that particular contract was against public policy—is entirely at variance with modern decisions. What Lord *St. Leonards* said in *Egerton* v. *Earl Brownlow* (2) was this: "Angry as the learned Judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the Common Law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced, is just as good a condition now as any that was ever inserted in a contract, because a partial restraint, created in that way with a particular object, is now perfectly legal. Without any exclamation of the Judge, and without any danger of prison, any subject of this realm may sue upon such a condition as Mr. Justice *Hull* was so very indignant at in that particular case." The same observation applies to the case of *Mitchel* v. *Reynolds* (3) with more or less force, because although that case is certainly perfectly sound as regards its great principle, namely, that contracts in restraint of trade which are unnecessarily large are void, yet there can be no doubt that that decision has been more or less affected by the course of the law since. In that case it was considered that the adequacy of the consideration was a matter to be investigated by the Court. The Courts have since repudiated their capacity to investigate that point. The law as laid down in that case created a presumption of invalidity as against the contract. That burden of proof has since been shifted as soon as it has been shewn that the contract has been entered into for the protection of the interest of one of the contracting parties; and therefore I repeat, although that case in its broad features is still undoubtedly the law, the law has grown since that case. I may be wrong, but it appears to me that the ground on which in that case it was said that the condition must be partial in point of space was clearly expressed by the learned Judge when he said:—"It can never be useful to any man to restrain another from trading in all places; though it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime." The Judge who decided that case seems therefore to have thought that a total restraint could never be necessary for the protection of the parties. If he was wrong in that assumption it would be a matter for future inquiry how far the limit which he created or imposed on that ground is or is not binding on the Courts at the present day. I should not have made these observations had it not been that my learned Brethren have thought it desirable to express their views without giving any decision on this point.

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(1) 14 Ch. D. 351.

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(1) 2 Hen. 5, Term. Pasch. pl. 26.

(2) 4 H. L. C. 238.

(3) 1 P. Wms. 181, 193.

[COTTON, L.J.:—I meant to decide the question.]

I desire not to decide it, but to say that I think the inquiry is still one which is open and worthy of great consideration—whenever it shall come up for decision before the Courts. What I mean to indicate is this: that I am not convinced that there is any other rule of limitation except that the contract shall not be unreasonably large. If it be more than reasonably large, then it tends to a monopoly without any corresponding good to the parties. If, on the other hand, it be not larger than is reasonable, it still seems to me that it would be remarkable that something else should be imposed on the contract, so that the contract would be required to be not only reasonable but something more. I rather incline to think that every reasonable contract ought to be enforced.

Then leaving these observations, which, after all, are only by the way in my decision, I come to the last branch of the contract, which is that *James Davies* is not to trade, act, or deal in any way so as to, either directly or indirectly, affect *Edward Davies* and *Edward Albert Davies*. In order to construe those words we must have regard to the position of things between the contracting parties. *James Davies* was a son, by the first marriage, of *Edward Davies. Edward Davies* was carrying on the business with his younger son, *Edward Albert Davies.* The assignment of the goodwill had (as was pointed out by Mr. *Warmington*) an implied covenant for quiet enjoyment of the goodwill. We have, therefore, before we arrive at this covenant, an implied covenant for quiet enjoyment of the goodwill; a covenant to retire from the business; a covenant to retire from every branch of the same business which the partnership carried on. Now the covenant for quiet enjoyment has not been sued upon; therefore we have not to consider it, except for the purpose of construction; but I am bound to give to this last covenant some real meaning in addition to all the previous covenants. I think, therefore, that it is something more than retiring from the business of the partnership, and not carrying on any branch of the same business. I think that, popularly speaking, it means this: that as long as the father and the half-brother are connected together, *James Davies* will not in any way annoy or interfere with them; but I think that it is a contract not relating to the business only, but relating to the two *Davieses* so long as they have any common interest. I think it is, therefore, one which does not pass with the business, and which cannot be broken after the death of *Edward Davies.*

But further than that, I desire to say that the contract appears to me to be couched in such vague terms, and doubtful words, that I think it can be enforced neither at Law nor in Equity. Mr. *Warmington*, who undoubtedly felt the difficulty in the way, asked us to separate the words "directly" and "indirectly," and to hold, if the covenant could not be enforced with regard to conduct having an indirect effect on the *Davieses*, that it might with regard to a direct effect. But that construction is not open in this case, because those words, "either directly or indirectly," are only an amplification, or explanation, of the affirmative words, "in any way." Therefore we have a contract not to trade in any way to affect the two *Davieses*; not to act in any way to affect them—not to deal in any way to affect them. I think that no such vague and general covenant, which is not even in terms confined to injurious affection, could be enforced.

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For these reasons I am unable to concur in the conclusion arrived at by Mr. Justice *Kekewich*, and I think that this action ought to have been dismissed with costs, and must now be dismissed with costs, here and in the Court below.

COTTON, L.J.:—

As Lord Justice *Fry* misunderstood me, I think I had better state (what I thought I had done) that my first ground for deciding that the previous clause of this covenant is bad is, that it is in restraint of trade generally, which, in my opinion, the law holds to be bad. The law does not allow that, and therefore it is not covered by that expression, "so far as the law allows."

Solicitors for Plaintiffs: *Brooks, Jenkins, & Co.*, agents for *Shelton & Co., Wolverhampton.*

Solicitor for Defendant: *R. Chapman.*

M. W.

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STIRLING, J.
Jan. 27, 29, 31;
Feb. 21.
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June 17, 18, 20, 22.

In re MARRETT.
CHALMERS *v.* WINGFIELD.

[1880 M. 3725.]

Domicil—Abandonment of Domicil of Choice—Change of Intention—Revival of Domicil of Origin.

In order to lose the domicil of choice and revive the domicil of origin it is not sufficient for the person to form the intention of leaving the domicil of choice, but he must actually leave it with the intention of leaving it permanently.

THIS was an action by the executor of the will of *G. W. Marrett* for administration of his estate. By the judgment on the 2nd of June, 1881, the usual accounts were directed, and an inquiry where the testator was domiciled at the time of making his will and from thence up to and at the time of his death, and in case it should appear that his domicil was English, certain further inquiries were directed, and certain other inquiries if it should appear that his domicil was other than English.

The testator's domicil of origin was Anglo-Indian. He was born in *India* about the year 1813, and his father was an English officer in the *East India Company's* service. He was himself in the service of the company, and in early life married at *Madras* a Dutch lady, who died about 1869. In 1854 he entered the service of the Nizam of *Hyderabad* as chief engineer. In 1868 he was pensioned by the Government of *India* for his long services. He never left *India* till 1870, when he came over to *England* in May, and returned to *India* in October of the same year. During this visit he took a trip to *Germany* and *Switzerland* for about a month. He was possessed of considerable house property in *India*, a great part of which he sold in 1870. He left *India* in the spring of 1871, on leave for fifteen months. He at once went to *Darmstadt*, where he at first lived in an hotel, then in private lodgings for about a year, and then in a house which he purchased in 1873, and in which he made expensive improvements. On the 31st of July, 1874, he made his will at *Wiesbaden* in English form, describing himself as late of *Hyderabad* and "at present of *Bessungen, Hesse Darmstadt*." He did not return to *India* till the latter part of 1874, when he went there for the purpose of winding up his affairs, and settling with the Nizam's Government about his retiring pension. During this visit he disposed of all his remaining property in *India* and resigned his appointment under the Nizam, who granted him a retiring pension. He left *India* in the same year and returned in April, 1875, to *Darmstadt*, where he resided till the time of his death, which took place in January, 1876.

That the testator left *India* without any intention of returning thither was not in dispute, and there was in the opinion of the Court sufficient evidence to shew that he went to *Darmstadt* with the intention of permanently residing there. There was, however, evidence that the testator during visits to *England* in 1871, 1872, 1873, and 1874, had expressed an intention of coming to reside in *England*, and had looked out for a house there which he could purchase, and that from time to time he had expressed dissatisfaction with his residence in *Darmstadt* and a wish to reside elsewhere.

The Chief Clerk found that the testator was domiciled in *Hesse Darmstadt* at the date of his will and thenceforth down to his death.

The Plaintiff applied to vary this certificate. The summons came on for hearing before Mr. Justice *Stirling* on the 27th of January, 1887.

W. Pearson, Q.C., and *Carson*, for the Plaintiff:—

The mere residence of the testator in *Germany* without any intention to reside there permanently does not get rid of the Anglo-Indian domicil.

He made a will in English form as an Englishman, and appointed an English executor, and the English probate was a very material fact in the Plaintiff's favour. He insured his life in an English office, and the premiums were paid in *London*. He received his pension from *London* through an English bank, and his agents in *London* transacted all his affairs, all his property being in *England* and *India*.

While in *Germany*, where he had no relatives, he was continually visiting his friends in *England*. The testator's will, if it be held that his domicil was German, can have no effect given to it—it will be not existent.

The question is whether he had finally made up his mind and had determined to remain permanently in *Germany*. There is much in the correspondence which makes it clear that he had not done so.

The authorities shew that the question in such a case is not whether there was an intention to retain the domicil of origin, but whether there was an intention to acquire a new domicil: *Whicker* v. *Hume* (1); *Moorhouse* v. *Lord* (2); *Bell* v. *Kennedy* (3); *Udny* v. *Udny* (4); *The Lauderdale Peerage* (5); *De Mora* v. *Concha* (6); *In re Patience* (7); *Jopp* v. *Wood* (8); *Dicey's* Law of Domicil (9).

The conclusion to be drawn from the cases is, that mere residence, unless it be so long continued as under the circumstances to shew an abandonment of origin of domicil and the choice of a new domicil, is quite immaterial. The Court has to discover what was the intention of the individual, and unless it can be gathered from the evidence that he had intentionally abandoned his domicil of origin, and changed his status, he retained that domicil.

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(1) 7 H. L. C. 124, 159, 165.

(2) 10 H. L. C. 272, 291.

(3) Law Rep. 1 H. L., Sc. 307, 315.

(4) Ibid. 441, 445, 449.

(5) 10 App. Cas. 692, 739.

(6) 29 Ch. D. 268, 300.

(7) Ibid. 976, 984.

(8) 4 D. J. & S. 616.

(9) Page 122 *et seq.*

Marcy, for a defendant—one of the testator's grandchildren in the same interest—adopted the arguments for the Plaintiff.

Hastings, Q.C., and *Farwell*, for the Respondents:—

The testator after visiting *Europe* in 1870 went back to *India*, and when he left that country in 1871 he had practically resigned his position under the Nizam. The conclusion from the evidence is irresistible that if he did not go back to *India* he was to be treated as having resigned.

He returned to *Germany*, and then he came on to *England* to reside in lodgings. That which was said by Lord *Westbury* in *Udny* v. *Udny* (1) applies to this case. The testator's mind had become impregnated with the idea that *Germany* was a very nice country to reside in, and that he would take up his abode there. This case is not like that of *Whicker* v. *Hume* (2), as the *animus manendi* was abundantly proved by the Respondents. The description in the will and other documents of the testator are circumstances of little weight; they merely went to identify him. Of more force are the facts that he displayed a great knowledge of the German language, which he could read and write; and that he purchased a house in *Germany;* in which, having said good-bye to *India*, he lived and died. He came over to *England* sometimes to visit the Plaintiff and his wife, but all that is not evidence of any intention to leave *Germany* as against all the evidence of those numerous expressions of intention to reside there; besides, his position in *England*, being a half-caste, was not so assured as it was in *Germany*, and, it is submitted, that the Court will upon the evidence come to the conclusion that he had a German domicil. [The cases of *Jopp* v. *Wood* (3); *Attorney-General* v. *Pottinger* (4), *Re Steer* (5), and *Dicey's* Law of Domicil were referred to.]

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(1) Law Rep. 1 H. L., Sc. 458.
(2) 7 H. L. C. 124, 159, 165.
(3) 4 D. J. & S. 616.
(4) 30 L. J. (Ex.) 284.
(5) 28 L. J. (Ex.) 22; 3 H. & N. 594.

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W. Pearson, in reply:—

The Respondents have not, it is submitted, succeeded in proving that the testator had determined to have a fixed home in *Germany* in which he would live and die. He had been accustomed to have a house of his own, and because he could not take a lease of a house in *Germany* he purchased one, but the purchase alone did not mean that he intended to fix his final residence there. He was, during such residence, seeking for a house at *Hampstead*, as he wanted to be near to the Plaintiff and his friends in *England*. The matter remained in dubiety. The onus is upon the Respondents, and the proof of intention must be clear and decisive, which it is not, and therefore their case fails.

1887. Feb. 21. STIRLING, J. (after fully reviewing the evidence, proceeded as follows):—

The conclusion to be deduced from the evidence appears to me to be that down to the time of his quarrel with the *Netz* family the testator had made up his mind to settle in *Germany*, and resided there with that intention, but that after the quarrel he found residence in *Darmstadt* less agreeable than he expected; that he from time to time, under feelings of dissatisfaction and impatience, expressed a wish to reside elsewhere, but that such wish, if it amounted to more than a passing inclination, was never carried into effect.

It is laid down by Lord *Chelmsford* in *Bell* v. *Kennedy* (1) that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicil. In my judgment the preponderating weight of evidence establishes the existence of such an intention in and subsequently to May, 1872, and as to the fact of residence in pursuance of that intention, if it existed, there is no dispute.

I am of opinion, therefore, that the testator had acquired a German domicil at the time of making his will, and that if he ever had any intention of abandoning that domicil he failed to carry it into effect. The conclusion arrived at by the Chief Clerk therefore appears to me to be correct.

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(1) Law Rep. 1 H. L., Sc. 307, 315.

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The Plaintiff appealed from this refusal, and the appeal was heard on the 17th, 18th, 20th, and 22nd of June, 1887.

Pearson, Q.C., and *Carson*, for the appeal:—

The original domicil was Anglo-Indian, and we say that on the evidence the testator never lost it, for that he only went to *Germany* for his health, and never intended permanently to reside there. He could not acquire a new domicil without actual residence with the *animus manendi*: *Brown* v. *Smith* (1). But supposing the testator did acquire a German domicil we say that he lost it, and if a man loses his new domicil without acquiring another the domicil of origin revives, for the original domicil clings to him, and can only be displaced by his having another domicil: *Bell* v. *Kennedy* (2). Where a person acquires a domicil other than his domicil of origin the domicil of origin is not extinguished, but is only in abeyance. When the domicil of choice is abandoned the domicil of origin revives without any express intention to revert to it: *Udny* v. *Udny* (3); *In re Patience* (4). In order to exclude the domicil of origin there must be residence in another country with a fixed intention of residing there. Now here the testator though resident in *Germany* had given up the intention, if ever he had it, of permanently residing there, and his domicil of origin revived. An acquired domicil does not cling to a man like his domicil of origin, and the intention to abandon it is enough without an actual change of residence.

Hastings, Q.C., and *Farwell*, for the Respondent:—

Domicil can only be changed *animo et facto*: *Jopp* v. *Wood* (5); and there is no authority for saying that intention unaccompanied by acts will change an acquired any more than an original domicil. In cases of domicil first the *factum* and then the *animus* has to be ascertained: *Attorney-General* v. *Pottinger* (1). *Douglas* v. *Douglas* (2) supports the same view. The evidence here sufficiently shews that the testator went to *Germany* and settled there with the intention of permanently residing there—he therefore acquired a German domicil, and the contention that it could be cast off without his leaving his place of residence, or even making any preparations to do so, is quite novel. *Re Steer* (3) is an instance of intention not prevailing against acts.

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(1) 15 Beav. 444, 449.

(2) Law Rep. 1 H. L., Sc. 307, 321.

(3) Law Rep. 1 H. L., Sc. 441.

(4) 29 Ch. D. 976, 984.

(5) 4 D. J. & S. 616.

Carson, in reply:—

The present case is very like *Bell* v. *Kennedy* (4).

[BOWEN, L.J.:—Is there any case where the domicil of origin has been held to revive in consequence of the person changing his mind without doing any act in pursuance of that change?]

There is no such case, but the expressions of Lord *Westbury* in *Udny* v. *Udny* (5) and *Bell* v. *Kennedy* are in our favour. The point was raised, but not decided in *Re Raffenel* (6). The testator never describes himself as "of" any place in *Germany*, but always as "now residing at," which shews an absence of intention to reside permanently there.

COTTON, L.J.:—

This is an appeal on the question what was the domicil of the testator at the time of his death and at the time of making his will. Those are two distinct periods, and must be dealt with separately.

The facts are not brought before us very satisfactorily, for we have only affidavit evidence, and very little of the correspondence which must have passed between this gentleman and his friends and members of his family is before us, but we must decide as best we can upon the evidence as it stands.

It is an admitted fact that the testator's domicil of origin was Anglo-Indian. The question is whether he had, before either of those two periods, acquired a domicil of choice, and whether he retained the domicil of choice at either of those two periods.

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(1) 30 L. J. (Ex.) 284.
(2) Law Rep. 12 Eq. 617.
(3) 3 H. & N. 594.
(4) Law Rep. 1 H. L., Sc. 307.
(5) Ibid. 441.
(6) 32 L. J. (Prob.) 203.

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The law, as I understand it, is this, that the domicil of origin clings to a man unless he has acquired a domicil of choice by residence in another place with an intention of making it his permanent place of residence. If a man loses his domicil of choice, then, without anything more, his domicil of origin revives; but in my opinion, in order to lose the domicil of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicil of choice, and form an intention to leave it, but he must have left it, with the intention of leaving it permanently. Unless he has done that, unless he has left it both *animo et facto*, the domicil of choice remains. It may be lost *animo et facto*, and if lost, then, the domicil of origin, there being no other domicil, revives and attaches again; but the mere fact that a man when he has once acquired a domicil of choice begins to doubt whether he has done right or wrong, whether it would not have been better for him not to have taken up his residence in that country, does not destroy the effect of the residence taken up with the intention of permanently residing there. The fluctuations of a man's mind during his residence in a particular place are important in considering whether he ever, during his residence there, had a settled intention to make it his permanent residence; but if we arrive at the conclusion that he had, the subsequent fluctuations, do not, in my opinion, if unaccompanied by change of residence, destroy the effect of the residence with intention permanently to reside there. Lord *Westbury*, in *Bell* v. *Kennedy* (1), which is a remarkable case, says this (2): "The true inquiry, therefore, is—Had he this settled purpose, the moment he left *Jamaica*, or in course of the voyage, of taking up a fixed and settled abode in *Scotland*." To gain a new domicil the testator must have resided in the country with a fixed and settled purpose to make a permanent residence there; but if subsequent fluctuations of intention are to be taken into account, it would be almost impossible ever to determine whether a domicil of choice was acquired. The case of *Bell* v. *Kennedy* was a very curious case, because, although the gentleman went to *Scotland*, and did in fact reside there with his mother-in-law, his letters and conduct shewed that he had not at all made up his mind whether he

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(1) Law Rep. 1 H. L., Sc. 307.

(2) Law Rep. 1 H. L., Sc. 321.

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should buy an estate to live on in *Scotland*, or whether he should buy an estate in *England* for the same purpose. The point in that case was the death of the wife, when there was a dissolution of the community of goods which was effected by the marriage, and up to that time, on the evidence, he had a very doubtful state of mind as to whether he should fix himself in *England* or *Scotland*.

Having stated what I understand to be the law applicable to the case, I will proceed to consider the facts.

[His Lordship then entered into an examination of the facts, and stated his reasons for coming to the conclusion that the testator had taken up his residence in *Germany* with the settled intention of permanently residing there and had acquired a German domicil, which he had never made up his mind to abandon.]

In my opinion the finding that at the time of his will and at the time of his death the testator was domiciled at *Darmstadt*, in *Germany*, is correct.

BOWEN, L.J.:—

On the law as it has been stated by the Lord Justice I have little to add.

We are considering a case of change of domicil, and the question we have to determine is whether the domicil of origin can be shewn to be abandoned, and a domicil of choice substituted for it. When a man takes up his residence in a new country the problem which has to be solved is whether there has been such a fixed and settled intention permanently to reside in the new country as, concurring with the actual residence there, amounts to an adoption of a domicil of choice instead of the domicil of origin. That being the inquiry, the various fluctuations in the man's intention about a permanent residence which take place after the residence in the new country has been taken up are very material as throwing light on the question whether there has been at any time that fixed and settled intention of residence in the new country which is a necessary element to the idea of domicil. But when you have once arrived at the conclusion that there has been a fixed and settled intention of permanently residing in a new place, coupled with an actual residence in that new place, then the change of domicil is effected, and change of domicil once effected will not be undone by mere subsequent fluctuations of opinion on the part of the settler as to whether his choice of the new residence has been wise, or by expressions which lead one to think that he entertained vague and floating ideas of going to reside elsewhere.

As to the evidence before us, I agree with the Lord Justice that, as it stands, the true conclusion is that to which he has come. I do not propose to examine the evidence in detail, as I entertain considerable doubt whether we know the whole truth. I have a surmise that there must be substantial evidence in existence which has not been laid before us. The evidence has been taken on affidavit without cross-examination, and the affidavits of some of the most material witnesses are, to my mind, very vague and general. Again, I think there must be a great deal of correspondence in existence which has not been shewn to us, and no discovery of documents has been made from which we can guess what even is the correspondence in the possession of the parties. Although I agree with the conclusion to which the Lord Justice has come on the evidence before us, I entertain some doubt, arising from the imperfect character of the evidence.

FRY, L.J.:—

I am of the same opinion, and I shall endeavour to be short in stating the conclusions I have arrived at.

[His Lordship then, without making any observations on the law applicable to the case, entered into an examination of the evidence, and said that all the facts which were clearly established shewed the intention of the testator to make *Germany* his permanent home, and that the only evidence which was of any weight against that conclusion was not sufficient to countervail the cogent evidence that from 1870 downwards the testator intended that *Germany* should be his home, and that he gave effect to that intention by purchasing his house in *Germany*.]

Solicitor for Appellant: *H. W. Chatterton.*
Solicitor for Respondent: *F. Romer.*

H. C. J.

C. A.
1887
July 5.

In re PLATT (A PERSON OF UNSOUND MIND).

Lunacy—Jurisdiction of Judge of Appeal Court to make Orders in the Chancery Division—Judicature Act, 1873, *s.* 51 [*Revised Ed. Statutes, vol. xvii., p.* 86].

The letter of the Lord Chancellor requesting the Judges of the Court of Appeal sitting in Lunacy to act as additional Judges of the Chancery Division is not limited to petitions under the *Trustee Acts*, but applies to all applications in Lunacy which require also an exercise of the jurisdiction of the Chancery Division.

MARY PLATT was a person of unsound mind not so found by inquisition. By an indenture dated the 6th of August, 1856, a sum of Consols standing in the names of *Mary Platt, Ann Platt*, and two other persons since deceased, was declared to be in trust for the benefit of *Mary Platt* during her life, and after her death in trust for such person or persons as should at the time of her death be entitled thereto as the next of kin or otherwise representing the rights and interests of *Mary Platt*.

Two new trustees were subsequently appointed under a power in the settlement in the place of the two who died; and by an order dated the 20th of July, 1878, and made in Lunacy and in the Chancery Division of the High Court of Justice, in the matter of *Mary Platt* and in the matter of the *Trustee Acts* and the *Trustee Relief Acts*, it was ordered that the right to transfer the trust fund should vest in *Ann Platt* and the two new trustees to the exclusion of *Mary Platt*, and that they should transfer the fund into Court to the credit of "*Mary Platt* a person of unsound mind not so found and the trusts of an indenture dated the 6th of August, 1856."

Mary Platt died in April, 1887, and *Ann Platt*, who was her sole next of kin, took out administration to her estate, and presented a petition asking that the fund in Court might be transferred to her. The petition was entitled in Lunacy and in the Chancery Division of the High Court of Justice.

On the petition coming on a doubt was suggested by the Court whether the jurisdiction of the Lords Justices sitting in Lunacy to make orders in the Chancery Division was not confined to orders

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under the *Trustee Acts*, and whether they had power to make an order under the *Trustee Relief Acts*. But on consulting the letter by which the Lord Chancellor requests the Lords Justices to act as additional Judges of the Chancery Division under the 51st section of the *Judicature Act*, 1873, it appeared that the appointment was expressed in general terms, so as to relate to all orders required to be made in Chancery as well as in Lunacy.

The letter addressed by the Lord Chancellor to each of the Lords Justices so appointed is as follows:

"As it is convenient that orders should continue to be made as heretofore in Chancery as well as in Lunacy, I have to request you to act as an additional Judge of the Chancery Division of the High Court of Justice for the purpose of making such orders."

THE COURT (*Cotton*, *Bowen* and *Fry*, L.JJ.), accordingly made the order asked for.

F. Thompson, for the Petitioner.

Solicitor: *R. C. Adams Beck.*

M. W.

PALMER *v.* MALLET.

[1887 P. 1167.]

C. A.
1887
CHITTY, J.
June 24.
C. A.
July 13.

Agreement not to carry on the Profession of a Surgeon—Acting as Assistant.

M. became assistant to *H. & P.*, surgeons at *N.*, and entered into a bond which recited that he was taken into their employment on the terms "that he should not at any time set up or carry on the business or profession of a surgeon" in *N.*, or within ten miles thereof. The condition of the bond was that *M.* "shall not at any time hereafter directly or indirectly, and either alone or in partnership with or as assistant to any other person or persons carry on the profession or business of a surgeon" in *N.* or within ten miles thereof. The partnership having been dissolved, both partners continued to practise in *N.*, and *H.* engaged *M.* as his assistant at a salary. *P.* brought his action to restrain *M.* from acting as such:—

Held, that as the agreement recited in the bond was for the protection of the business carried on by *H. & P.*, and they had in the business a joint interest during the partnership, and several interests in the event of a dissolution, the agreement must be taken to be several as well as joint, and that *P.* could sue alone for a breach of it:

Held, also, that there had been a breach of it, for that a person acting as a surgeon was carrying on the profession of a surgeon, although he only acted as salaried assistant to a surgeon who carried it on for his own benefit.

Allen v. *Taylor* (1) distinguished.

Held, therefore, affirming the decision of *Chitty*, J., that an injunction ought to be granted.

IN October, 1881, *E. Hall* and *H. L. Palmer* entered into partnership as surgeons, accoucheurs, and apothecaries, for their joint lives at *Newtown*, in *Montgomeryshire*, with a power to each partner to determine the partnership by six months' notice.

In October, 1885, *Hall & Palmer* entered into negotiations with the Defendant, a licentiate of the *Society of Apothecaries*, to take him as their assistant at a salary of £130, and he accordingly entered into their employment.

On the 4th of December, 1885, *Mallet* gave to *Hall & Palmer* a bond, by which he bound himself to them for payment to them, their executors, administrators, or assigns, of £1000. The bond then proceeded as follows:—"Whereas the said *T. C. Mallet* has lately been taken into the employment of the said *E. Hall* and *H. L. Palmer* as an assistant in their said business or practice of surgeons, accoucheurs, and apothecaries, carried on by them in *Newtown* aforesaid, and its surroundings: And whereas one of the terms upon which the said *T. C. Mallet* was taken into the employment of the said *E. Hall* and *H. L. Palmer*, as aforesaid, was that he should not at any time set up or carry on the business or profession of a surgeon, accoucheur, apothecary, or physician in the said town of *Newtown*, or within ten miles thereof, and that he should enter into and execute these presents: Now the condition of the above written bond or obligation is such that if the said *T. C. Mallet* shall not at any time hereafter directly or indirectly, and either alone or in partnership with or as assistant of any other person or persons, or otherwise howsoever, set up or carry on the profession or business of a surgeon, accoucheur, apothecary or physician, or any branch thereof, or any professional business connected therewith within the said town of *Newtown*, or within ten miles thereof, without the consent in writing of the said *E. Hall* and *H. L. Palmer*, their executors, administrators, or assigns, being first obtained for that purpose: And if the said

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(1) 19 W. R. 556.

T. C. Mallet shall not either by himself or by any other person or persons, either on behalf of himself or any other person or persons, at any time hereafter solicit the custom or support of any of the persons who are now or may hereafter from time to time be the customers or patients of the said *E. Hall* and *H. L. Palmer*, their executors, administrators, or assigns, or either of them, in or in connection with such profession or business as aforesaid, or solicit any of such persons to discontinue his or her employing the said *E. Hall* and *H. L. Palmer*, their executors, administrators, or assigns, or either of them: But so that nothing herein contained shall prejudice or affect the right of the said *E. Hall* and *H. L. Palmer*, their executors, administrators, or assigns, to restrain by injunction any breach on the part of the said *T. C. Mallet* of the agreement hereinbefore recited, and to recover damages against him, his executors or administrators, for any antecedent breach thereof in lieu of taking proceedings against him or them under the above written bond, Then the above written bond or obligation shall be void."

Disputes arose between the partners, and in July, 1886, *Hall* commenced an action for dissolution of the partnership, and by the judgment given on the 2nd of May, 1887, the partnership was dissolved from that day. Each of the late partners continued to practise in *Newtown*, and *Hall* retained *Mallet* as his assistant. On the 6th of May *Palmer* commenced this action to prevent *Mallet* from directly or indirectly, and either alone or in partnership with or as assistant to any person or persons, or otherwise howsoever, setting up or carrying on the profession or business of a surgeon, accoucheur, apothecary, or physician, or any profession or business connected therewith, within the town of *Newtown*, or within ten miles thereof, without the consent of *Hall* and the Plaintiff, their executors, administrators, or assigns, being first obtained for that purpose.

On the 24th of June, 1887, the Plaintiff moved before Mr. Justice *Chitty* for an injunction.

Romer, Q.C., and *Alan Stewart*, for the Plaintiff.

Aston, Q.C., and *Yate Lee*, for the Defendant:—

The Defendant, by entering into employment as an assistant has not been carrying on business within the condition of the bond: *Allen* v. *Taylor* (1).

The bond which was entered into by the Defendant with *Hall & Palmer* being joint only, and not joint and several, *Palmer* alone cannot maintain an action in respect of it: *Addison* on Contracts (2); *Lindley* on Partnership (3). And being intended for the protection of the joint business only, now that such business has come to an end, the bond can no longer be put in force. Moreover the words of the condition, which are "either alone or in partnership with or as assistant of any other person or persons," cannot be construed to include the acting as assistant of one of the parties to the bond.

Romer, in reply:—

The Plaintiff suing alone is entitled to maintain this action, as in the case of one of several mortgagees where the others are unwilling to be joined as co-Plaintiffs, or have done some act to prejudice their right or to sever their interest from that of the Plaintiff: *Luke* v. *South Kensington Hotel Company* (4).

CHITTY, J.:—

The question to be determined in this case is whether the Plaintiff has a legal demand against the Defendant *Mallet*, or a right in equity to sue for an injunction.

The action is not founded on the bond, but it is founded on an agreement to be gathered from the bond itself, which contains an express provision saving the Plaintiff's right to an injunction. The agreement to my mind must be extracted from the bond taken as a whole, that is, from the recital which precedes the defeasance, and the defeasance itself. I may state that the question arises upon an instrument not well framed, and upon which there may be a difference of opinion. But I must take the instrument as a whole, and unless upon reading it as a whole I am satisfied that there is such an agreement as the Plaintiff contends there is, and also that there has been a breach, I ought not of course to grant any injunction.

(1) 19 W. R. 35.
(2) 6th Ed. p. 1043.
(3) 4th Ed. p. 293.
(4) 11 Ch. D. 121.

Now the bond is plainly joint, but that does not appear to me to determine the question in regard to whether the Plaintiff can sue alone or not. After the bond there is a recital that *Mallet* has lately been taken into the employment of Messrs. *Hall & Palmer* "as an assistant in their business or practice of surgeons, accoucheurs, and apothecaries, carried on by them in *Newtown* aforesaid, and its surroundings." That is followed by a recital that one of the terms on which *Mallet* was taken into the employment of Messrs. *Hall & Palmer* was that he should not at any time "set up or carry on the business or profession of surgeon in the said town of *Newtown*, or within ten miles thereof, and that he should enter into and execute these presents."

For the Defendant it is contended that that recital alone shews what the agreement was, and upon this recital that an agreement not to "set up or carry on the business or profession of a surgeon, &c.," is not broken by the Defendant becoming an assistant to a gentleman who does carry on such a business. That argument is founded on the words "set up or carry on;" and in connection with that point the decision of Lord *Hatherley* in *Allen* v. *Taylor* (1) has been cited.

For the Plaintiff it is contended that, however the term "set up or carry on" business standing alone might be construed, there is enough in what follows of this document to shew in what sense the parties used the term.

In my judgment the Plaintiff is right. I put the case on this head shortly by referring to the language of Lord *Cairns* in the well-known case in which he said that the testator was his own dictionary. I think in the later part of the instrument the term "set up and carry on" is so explained by the parties as to shew that they considered the carrying on of business as assistant was a carrying on which was intended to be prohibited.

The grounds upon which I come to this conclusion will be shewn when I read the defeasance. The condition of the bond [to which his Lordship referred], to my mind, shews that the parties intended to cover the becoming an assistant by the term "set up or carry on." Whether it is a correct grammatical form of expression is beside the point: I read it as if the parties had said in plain terms, as I think they have sufficiently, by the term "set up or carry on," we mean to include the acting as an assistant.

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(1) 19 W. R. 35.

Then it was contended on behalf of the Defendant that, as there is an express reservation of the right to obtain an injunction, that is sufficient to exclude the ordinary doctrine of the Court of Equity. It is well known that the Court of Equity, notwithstanding that there is a bond given for the performance, does in a proper case interfere by injunction to prevent a breach of the agreement. It is said that general doctrine is excluded by the terms of this provision. It comes in somewhat awkwardly in a parenthesis towards the end of the defeasance: "but so that nothing herein contained shall prejudice or affect the right of Messrs. *Hall & Palmer* to restrain by injunction any breach on the part of the said *Thomas Charles Mallet* of the agreement hereinbefore recited." Upon that it is said that the term "hereinbefore recited" should be construed strictly, and that the term "recited" should be taken in the lawyer's sense. I need hardly say the words "hereinbefore recited" are not necessarily limited to what the lawyers technically call "recited;" the words are sufficient to include the whole agreement shewn, and I am satisfied that is the meaning of the term on this point. But, dealing with the exact point raised by the Defendants in their argument, I say that, even if the term "recited" ought to be limited to the lawyer's strict technical sense, yet the same result follows, and for this reason, that I have the term "set up or carry on" explained in sufficiently definite language by the parties themselves. That being so, I think thus far the Plaintiff is right.

But then comes the question whether the Plaintiff can sue alone. The result of what has been done by Mr. *Hall* is—and counsel at the bar are agreed upon this—that he has in substance released this particular breach, and Mr. *Hall* clearly could not sue—it would not be to his interest to sue. He has taken a gentleman whose services he considers to be of value to him, and unless I interfere at the suit of Mr. *Palmer* alone, Mr. *Palmer* would be left without remedy. That observation does not dispose of this case, although it was an observation that was almost sufficient to dispose of the case of *Luke* v. *South Kensington Hotel*

Company (1). I have to look at this instrument for the purpose of ascertaining whether it was in the contemplation of these parties that one of these gentlemen could sue alone.

The legal mode of expressing that proposition is this: where the instrument does not in express terms shew that the agreement is made with two persons jointly, or with two persons separately, it is a question of construction whether they can or must sue jointly, or can or must sue separately, or both, and the best guide to ascertain the intention of the parties in that respect is to look at the instrument itself, and see what interests are intended to be protected.

Now the agreement unquestionably was with two gentlemen who were partners. Stopping there for the moment, *primâ facie* that would be joint. Now it is well known that the business of a country practitioner is from time to time passed from hand to hand by way of sale, and it would not be an unreasonable thing that the parties should say they intended to protect the business not merely when carried on by the two, but protect the business of each one.

I think it was intended that either partner should have the right to sue. I come to that conclusion upon reading and considering the terms of the defeasance, and in my opinion, as I have already expressed it, the defeasance explains and really states the agreement. It is an amplification beyond all question, and to my mind it is an amplification of a short recital. The defeasance in what I may call the first clause is that *Mallet* is not to carry on business in the manner mentioned without the consent in writing of Mr. *Hall* and Mr. *Palmer*. But it does not stay there but goes on thus, "their executors, administrators, or assigns." That points at once to the kind of interest that exists in matters of this kind. It treats Messrs. *Hall & Palmer* as having something they can assign, and is directed to such a case as one of the partners retiring, as often occurs, one being older than the other and a new partner being taken in. Say Mr. *Hall* retired by selling his interest with the consent of Mr. *Palmer*, and Mr. *Palmer* went on with a new partner, it seems to me that these words would be sufficient to enable Mr. *Palmer* to bring his action for

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(1) 11 Ch. D. 121.

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the protection of himself and the assign of Mr. *Hall*. My attention was called to the fact that the word is "assigns" and not "the assigns of them or either of them," which unquestionably is the proper conveyancer's form. But there occur in the later part of the defeasance similar terms as to patients—not to solicit the patients of Messrs. *Hall & Palmer*—and then come the words "their executors, administrators, or assigns, or either of them." The instrument of course in this respect is not drawn with the most skilful hand, but I think the meaning is plain, and I think the words "or assigns" standing alone in the earlier part must be construed with reference to the words "assigns or either of them" in the later part, because as regards soliciting patients and not practising it is the same kind of thing. The whole was intended to be for the protection of Messrs. *Hall & Palmer* with respect to their business, and it would be an extraordinary thing that in one case the assigns would be joint assigns, and in another case the assigns of either would be sufficient. That cannot have been intended. Then again I find the words in a subsequent part—he is not to solicit any person to discontinue his or her employing Messrs. *Hall & Palmer*, "their executors, administrators, or assigns, or either of them," so that the words "or either of them" occur twice.

The result, then, I think is, although I agree it is a question of some difficulty, because the instrument is not well drawn, that it was intended by the parties that either of these gentlemen should have the right to sue for any breach of this agreement that was detrimental to his interests.

I may make this further observation, that the Defendant is committing a breach of the first portion of the defeasance because he is acting as assistant to Mr. *Hall* without the consent in writing required by the instrument, that is the consent in writing of Messrs. *Hall & Palmer*. I state that because the point was alluded to although it was not very much pressed.

I therefore come to the conclusion that Mr. *Palmer* has an equitable right to his injunction.

F. G. A. W.

C. A.

An injunction was accordingly granted to restrain *Mallet* from carrying on the business or profession of a surgeon, accoucheur, apothecary, or physician, in the town of *Newtown* or within ten miles thereof.

The Defendant appealed, and the appeal was heard on the 13th of July, 1887.

Aston, Q.C., and *Yate Lee*, for the appeal:—

The bond was given for the protection of a going business. We say, first, that *Palmer* therefore cannot sue alone for an injunction, the bond not having been given for the protection of the business which he now carries on. It may be that if the old business had been handed over, and one party refused to sue, the other might sue alone—but this is not such a case. What was to be protected was the business of the firm. Secondly we say that there is no breach of any agreement between the parties. The agreement recited is that *Mallet* would not set up or carry on the business of a surgeon within ten miles of *Newtown*. The defeasance amplifies this. Now the acting as an assistant without any share of profits is not carrying on business: *Allen* v. *Taylor* (1); so there is no breach of the recited agreement. Thirdly, as the bond recites an agreement which ought to have been carried out in the defeasance, the injunction will only lie for breach of such an agreement as is recited. We submit that Mr. Justice *Chitty* was wrong in construing the recital as extended by the defeasance. But if the defeasance is to be taken as expressing the agreement the word "other" must mean "other than the parties to the bond": *Corporation of Bristol* v. *Westcott* (2), and, if so, *Mallet's* serving *Hall* is no breach.

[COTTON, L.J.:—It appears to me to mean any person or persons other than himself.]

Romer, Q.C., and *Alan Stewart*, for the Plaintiff, were not called upon.

COTTON, L.J.:—

I cannot say that we have not had some difficulty in dealing with this case. We are asked to give effect to and to enforce a contract, when nothing is known of its terms but from a recital in a bond. The action is not on the bond, but one of the two partners in whose favour that bond was executed relies on an agreement recited in it, and asks the Court to grant an injunction to restrain Mr. *Mallet* from breaking the recited agreement. We cannot now finally decide the question between the parties, but unless there is some further evidence as to the terms of the agreement beyond the recital in the bond, I do not see how the parties can usefully go on with this litigation.

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(1) 19 W. R. 556.

(2) 12 Ch. D. 461, 466.

Now was Mr. Justice *Chitty* right? I think he was. He granted an injunction, in the terms of the agreement recited, to restrain the Defendant Mr. *Mallet* from carrying on the business or profession of a surgeon in *Newtown* or within ten miles thereof. At the time when this bond was entered into Mr. *Palmer* and Mr. *Hall*, as appears in the bond, were carrying on business in partnership together at *Newtown*, as surgeons, accoucheurs and apothecaries. The bond recites, "Whereas the said *T. C. Mallet* has lately been taken into the employment of the said *E. Hall* and *H. L. Palmer* as an assistant in their said business or practice of surgeons, accoucheurs and apothecaries carried on by them at *Newtown* aforesaid and its surroundings. And whereas one of the terms upon which the said *T. C. Mallet* was taken into the employment of the said *E. Hall* and *H. L. Palmer* as aforesaid was that he should not at any time set up or carry on the business or profession of a surgeon, accoucheur, apothecary or physician in the said town of *Newtown* or within ten miles thereof, and that he should enter into and execute these presents."

Now that recital deals with two things, the execution of the bond, and the contract on which Mr. Justice *Chitty* has relied.

I do not refer to the terms of the condition of the bond, because what we have to deal with is the agreement appearing on that recital. We must look at the position of the parties with whom that agreement was entered into. They were carrying on business as partners. Although they were partners for life, that partnership might be put an end to, and in fact it has been put an end to, so that they had a joint interest as partners in the business which they carried on as surgeons, accoucheurs and apothecaries, and they had several interests in it in the event of a dissolution. That being so, the proper construction of this imperfectly recited agreement is that it is an agreement entered into by the Appellant with the partners jointly and severally. I think that in this I am only following the rule laid down by Mr. Baron *Parke* in *Sorsbie* v. *Park* (1): "The rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint. Suppose there were a covenant with *A.* and *B.* jointly, that a certain thing should be done by the covenantor; both of those persons must sue. But where it appears upon the face of the deed that *A.* and *B.* have several interests, they must sue separately." Then in *Sheppard's* Touchstone (2) it is said: "But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect." Now when all we have is this recital, which both parties agree that at present we must treat as the only evidence of a contract, I think, having regard to what I mentioned as being the position of these two gentlemen, *Hall* and *Palmer*, as regards—not the partnership business, but as regards the business which was being carried on by them as partners—we ought to consider this as an agreement both joint and several. That gets rid of one, and, to my mind, the principal difficulty in the Plaintiff's case.

But there is another objection. It is said that assuming Mr. *Palmer* to be entitled to sue, yet the Defendant has not committed any breach of his contract that he should not at any time set up or carry on the business or profession of a surgeon, and it is said that the Defendant is not doing so where he is simply acting as assistant at a salary for another man who is carrying on the business for his own benefit. I do not think that the question whether the Appellant is carrying on the business or profession can depend on whether he is paid by salary or by a certain share of the profits. It is true that in *Allen* v. *Taylor* (1), where there was a contract not to carry on the trade of a rag dealer, it was held that merely acting as clerk or assistant to a person carrying on that trade was not a breach of the covenant. But an agreement not to carry on a trade is a very different thing from an agreement not to carry on a business or profession. "Carrying on a trade" implies to my mind that the person engaged in it is engaged in it *quâ* trade, that is to say, as a trade producing profit or loss which is to be shared by him, and that is not the case if he is merely a salaried assistant. I cannot come to the conclusion that a man is less carrying on the profession of a surgeon because he is doing so as assistant to some one else. "Profession" is different from trade, and it is much more emphatic to my mind than if "business" alone were here. When, as here, the words "carry on the business or profession of a surgeon" are merely used to denote what is done by a man acting as a surgeon, a man, in my opinion, acts as surgeon and carries on the business of a surgeon none the less because he is not the principal or engaged in the business as a partner, but is merely carrying it on as assistant to somebody else. In my opinion, therefore, on both points the appeal fails.

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(1) 12 M. & W. 146, 158. (2) Page 166.

BOWEN, L.J.:—

I am of the same opinion. The first question is how to construe this agreement, or rather perhaps how to treat the short recital of it contained in the bond, and to see whether we are to draw the inference from that recital that the contract between *Hall & Palmer* on the one side, and *Mallet* on the other, was a joint contract or a joint and several contract. The rule has been expressed by Lord Justice *Cotton*, that where the words are capable of either construction you must look at the general tenor and context to see whether the contract was joint or joint and several. The whole of the cases connected with that point will be found, I think, collected in *Wms. Saunders* (2), in the recent edition, and *Sorsbie* v. *Park* (3), and *Bradburne* v. *Botfield* (4), are leading authorities upon it. That being so, we must look at this bond as a business document, and see if we can extract from it anything that throws light on the terms upon which *Mallet* was taken into the employment of the firm. It seems to me, when you look at the whole of it, you see that *Hall & Palmer* were carrying on business in partnership. Nothing is said, it is true, about the way in which the partnership was to come to an end, nor was it necessary to do so. It is obvious that a partnership cannot last for ever. There is no certainty that it will not be determined either on notice or otherwise even during the lifetime of both partners. Now unless after such determination each partner was to have a several interest in the performance of this contract by *Mallet*, he would be at liberty to set up practice at *Newtown*, with the experience gained in their service, and to the injury either of Mr. *Hall* or Mr. *Palmer*, or both, according as either or both remained in *Newtown*. That shews, in fact, that there must have been separate interests as well as a joint interest in these two persons, and though the interest in the bond would be joint so long as they continued in partnership, nevertheless there was the possibility that it might be severed, and we should expect to find the protection to be commensurate with the interests which were reasonably to be inferred from the description of their business. Therefore I think the true construction of this agreement is that either Mr. *Palmer* or Mr. *Hall* might enforce it for his own benefit during his lifetime, in the event of the partnership having come to an end.

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(1) 19 W. R. 556.

(2) Vol. i., p. 162.

(3) 12 M. & W. 146.

(4) 14 M. & W. 559.

The next question is, has there been a breach? That seems also a rather difficult question. To answer it we must inquire what is the meaning of "set up or carry on the business or profession of a surgeon." We have in the bond a clause which throws a great deal of light on it. I do not say that it is an interpretation clause, because I do not think that the language of the original agreement is strictly to be construed by what you find in the condition; but if the condition shews that the persons who drew the bond included in their own minds under the words "setting up and carrying on the business or profession of a surgeon," the setting up business as the assistant of somebody, that, I think, is an indication that in the original agreement

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carrying on the business or profession of a surgeon was intended to include acting as an assistant to a surgeon. That, I think, is the answer to Mr. *Yate Lee's* argument founded on the word "other." It does not follow that because the words "assistant to any other person or persons or otherwise howsoever" in the condition would not cover any particular case, therefore that case could not fall within the original agreement. I think that according to the true construction of the earlier clause a person is not the less carrying on a profession because he only acts as the assistant of some one carrying it on. For these reasons I agree with what Lord Justice *Cotton* has said, and although I express my own opinion I do not in any way dissent from anything he has said.

FRY, L.J.:—

I have arrived at the same conclusion as my learned brethren, and I will add very little. The grounds of my conclusion are the same as theirs, with possibly a slight exception. I am rather more inclined to think that there is only one agreement to be found in the whole of this document, that is to say, I incline to think that the agreement which is implied in the condition is the same as that which is referred to in the recital, and that therefore the recited agreement is to be treated as that which is written out more fully in the condition. This difference of opinion is immaterial, and probably the view taken by the Lords Justices is the more accurate one.

Solicitors for Plaintiff: *Talbot & Quayle*, agents for *Talbot & Woosnam, Newtown.*

Solicitors for Defendant: *Bolton, Robbins, Busk, & Co.*, agents for *Ed. Powell, Newtown.*

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[1887 C. 5347.]

Patent—Threats of Legal Proceedings by Patentee — Injunction to restrain Threats—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), s. 32 — *Interlocutory Injunction — Balance of Convenience and Inconvenience.*

C., a patentee, brought an action under sect. 32 of the *Patents Act* of 1883 against *R.*, a prior patentee of a similar invention, to restrain *R.* from issuing threats of legal proceedings against persons selling *C.'s* patent articles. Shortly after *C.* had sued out his writ, but before it had been served, *R.* had commenced an action for infringement against the *P. Co.*, who were selling *C.'s* articles:—

Held, that the action mentioned in the proviso to sect. 32 as taking a case out of the section need not be an action against the person who is suing to restrain the threats, but that an action for infringement honestly brought with reasonable diligence against any of the persons who have been threatened will, if duly prosecuted, satisfy the proviso:

Held, that in considering whether such an action is brought with due diligence, the time of issuing the threats, and not the time when the party bringing the action first knew of the acts which he alleges to be infringements, is the period to be looked to.

In order to obtain an interlocutory injunction the plaintiff must make out a *primâ facie* case, *i.e.*, a case such that if the evidence remains the same at the hearing it is probable that he will obtain a decree, and unless he makes out such a case an injunction will not be granted on the mere consideration of the balance of convenience and inconvenience.

Semble, in an action under sect. 32 of the *Patents Act*, 1883, to restrain a patentee from issuing threats, the validity of the defendant's patent may be called in question.

Kurtz v. *Spence* (1) disapproved.

IN 1879 the Defendant *Royle* took out a patent for a tap-union for connecting hose pipes with taps. The Plaintiff on the 24th of March, 1886, took out a patent for a similar invention. A tap-union is a brass casing having at the top a hole for the introduction of the end of an ordinary water tap. Inside the casing is an india-rubber washer, which makes a water-tight joint. The difference between the inventions of the Plaintiff and Defendant appeared to be mainly in the shape of the washer. The Plaintiff's tap-union had an increasing sale, and there was evidence that the Defendant knew of it from May, 1886. Soon after the Plaintiff brought out his invention he heard that persons were going about the country stating that his tap-union was an infringement of the Defendant's patent, but did not discover that any step was taken by the Defendant till March, 1887, when the Defendant issued the following circular:—

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(1) 33 Ch. D. 579.

> "*Royle's* Patents.
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> "It having come to our knowledge that certain of our patents are being infringed, notably *Royle's* Patent Tap-Unions and Patent Archimedian Egg-beaters, we hereby caution our numerous friends against purchasing these imitation goods. It cannot be too generally known that all parties who handle a patent article, from the maker to the user, including also importers, are liable to the patentee. Our patent solicitor has instructions to take proceedings against all infringers."

On the 15th of April the Plaintiff's solicitor wrote to the Defendant as follows:—

> "I have been consulted by Mr. *J. Challender* with reference to a circular issued by you bearing date March, 1887, to the effect that what you call your patent tap-union is being infringed, and that your solicitor has instructions to take proceedings against all infringers. You are of course aware that my client is the patentee of a new tap-union, and it is quite evident that your circular, supported by certain misrepresentations made by your travellers, is calculated to mislead the public and to cause my client to sustain damage. My client's patent is in no way an infringement of yours. If you consider that it is so, he invites you to take proceedings against him as an infringer. If you do not, the public may draw their own conclusions, and my client will take such action with respect to your circular as he may be advised."

No answer was returned to this letter till the 9th of June.

In the meantime, on the 24th of May, a traveller of the Defendant bought one of the Plaintiff's tap-unions from a trader, Mr. *T. P. Taylor*, and returned to Mr. *Taylor's* shop and stated that the tap-union sold him was an infringement of the Defendant's patent, and that the Defendant contemplated legal proceedings for infringement, and he warned Mr. *Taylor* not to sell any more of the Plaintiff's tap-unions. A similar statement was made by an agent of the Defendant to another trader on the 4th of June. On the 9th of June the Defendant's solicitor wrote to a firm known as the *Manchester Plumbing Company*, who were selling tap-unions made according to the Plaintiff's patent, a letter threatening legal proceedings.

On the same 9th of June the Defendant's solicitor wrote to the Plaintiff's solicitor as follows:—

> "Mr. *Royle* has handed me your letter of the 15th of April, and in referring to it I beg to state that I am instructed by Mr. *Royle* to take proceedings against all infringers."

On the 11th of June the Plaintiff issued a writ of summons in this action for an injunction to restrain the Defendant personally, or by his servants, agents, and workmen, by circulars, letters, or otherwise, from threatening any person with legal proceedings or liability in respect of the manufacture, use, sale, or purchase of a certain tap-union of which the Plaintiff was the patentee, and from interfering by such threats or otherwise with the manufacture, use, sale, or purchase of the Plaintiff's invention.

The writ, and a notice of motion for an injunction in terms substantially the same as the above, were served on the Defendant on the 16th of June.

On the 17th of June the Defendant's solicitor wrote to the Plaintiff's solicitor, complaining that the action and notice of motion were premature and uncalled for, and that, if the ordinary course of writing a letter of application before issuing the writ had been followed, the Plaintiff would have been informed that on the 15th of June the Defendant had issued and served a writ against a firm infringing the Defendant's patent. He went on to propose that the Plaintiff's action should stand over pending the trial of the Defendant's action, with liberty to apply in case the latter action was not prosecuted with due diligence.

The action referred to in the last letter was an action commenced by the Defendant against the *Manchester Plumbing Company* on the 15th of June. The writ was served shortly afterwards, and an appearance was entered by the company on the 22nd.

The Plaintiff and the Defendant could not come to terms as to the Plaintiff's action standing over, and the Plaintiff moved before the Vice-Chancellor of the county palatine for an injunction. On the 5th of July an interlocutory injunction was granted in the terms given below (1). It was not clearly shewn before the

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(1) July 5. BRISTOWE, V.C. (after stating the facts of the case, proceeded as follows):—

Under those circumstances the question is what ought to be done. The Plaintiff says that the tap-union for which he has obtained his patent is no infringement of the Defendant's patent; the Defendant says that it is an infringement, and the question I have to consider is what, under the circumstances, upon that assertion and denial, ought to be done. Mr. *Hopkinson* says that the old established nature of the Defendant's business is a strong thing in his favour, and so it is in many cases. It is of great value to a patentee to be able to say that his patent has been in existence since 1879, and that he has not allowed it to be infringed without taking steps to prevent it. The Defendant further says that though he has not brought any action against the Plaintiff he has brought an action against the *Manchester Plumbing Company* for selling articles which he alleges to be similar to those manufactured by the Plaintiff. I do not consider that that is such an action as is contemplated by the latter portion of the 32nd section of the Act, which says: "Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." I quite concede that it is not necessary that the action should be against the Plaintiff, but it must be an action which would try the question whether the article manufactured by the Plaintiff is an infringement of the Defendant's patent.

That brings me to the question whether in determining as to the granting an interlocutory injunction, the view taken by Mr. Justice *Chitty* in the case of *Barney* v. *United Telephone Company* (28 Ch. D. 394) should be the guiding authority, or whether the later decision of Mr. Justice *Kay* in the case of *Walker* v. *Clarke* (4 Rep. Pat. Cas. 111) should be the guide of the Court. I must begin by saying that the view taken by Mr. Justice *Chitty* is one which, with all respect to that learned Judge, I should have felt very great difficulty in following, but if it had been the only decision on the point I should have felt myself bound to follow it, though respectfully dissenting from it, and the question might then have been considered by the Court of Appeal. The view taken by Mr. Justice *Chitty*, as stated in the head-note, is this: "On motion under the *Patents, Designs, and Trade Marks Act*, 1883, s. 32, to restrain the publication of advertisements warning the public that the invention claimed by the applicant is an infringement of patent rights claimed by the advertisers, and that all necessary proceedings will be taken to protect such rights should any attempt be made to manufacture or supply the invention claimed by the applicant, the applicant, as a condition precedent to obtaining

Vice-Chancellor that the articles sold by the *Manchester Plumbing Company* were the same as those manufactured by the Plaintiff,

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an injunction, must shew that there has been no infringement on his part. And if in opposition to the motion a case of alleged infringement is raised by the respondents' affidavits, an injunction will not be granted, although the respondents decline to take legal proceedings in respect of such alleged infringement against the applicant." With all respect to Mr. Justice *Chitty* I think that does not give effect to the true meaning of the Act. His judgment is very short, and he says as follows: "Sect. 32 of the Act of 1883 under which this motion is made contains this condition:—'If the alleged manufacture . . . to which the threats related was not in fact an infringement of any legal rights of the person making such threats.' In this case there appears to be a serious question between the parties whether the instrument sold by the plaintiff is an infringement or not of the defendant company's patent rights. There is a conflict of affidavits upon the point, and therefore the question is one which the Court cannot decide on this motion. As the plaintiff is not able to prove that there is not in fact any infringement of the defendant company's rights—which is a condition precedent to his obtaining an injunction—the motion must be refused."

That case was cited in the subsequent case of *Walker* v. *Clarke* (4 Rep. Pat. Cas. 111), and, according to that report, Mr. Justice *Kay*, without referring in terms to Mr. Justice *Chitty's* view, proceeded from an entirely different standpoint. It appears to me that Mr. Justice *Kay's* judgment is founded upon the true basis, viz., that where it is a question of granting an interlocutory application such as this you have not to throw upon the person applying for it, as a condition precedent, the obligation of proving that he is not in fact guilty of an infringement of the patentee's right. I think that the true principle is that laid down by Mr. Justice *Kay*, following the old decisions to which he refers, viz., that the question for the Court to consider on such an application is the balance of convenience or inconvenience which would be caused to the party plaintiff or defendant by acceding to or refusing the particular motion which is made. Mr. Justice *Stirling* in the subsequent case of *Burt* v. *Morgan* (3 Times L. R. 666), and Vice-Chancellor *Bacon* in *Driffield* v. *Waterloo & Co.* (3 Rep. Pat. Cas 46), though not exactly taking the same particular point of view, did not either of them dissent from the decision of Mr. Justice *Kay* in *Walker* v. *Clarke* (4 Rep. Pat. Cas. 111).

That being the basis of the judgment which I am now giving upon the motion, there are, in my opinion, two questions of importance to be considered. First of all, has there been made out the case which Mr. *Hopkinson* urged to have been clearly made out—that the Plaintiff is infringing the Defendant's patent? I do not wish to prejudice the case, because it will have to come before me upon the trial, and I think it would be unfair to express, as I was urged to do by Mr. *Hopkinson*, a present opinion upon the point. There has been put in a mass of evidence, some eighteen or nineteen affidavits, bringing forward matters bearing on the question of infringement in a way that would be most inconvenient if that question were to be tried now. I think, without

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but it was afterwards shewn before the Court of Appeal that they were tap-unions made by the Plaintiff according to his patent.

The Defendant appealed from the order of the Vice-Chancellor. The appeal was argued on the 20th and 21st of July.

Moulton, Q.C., and *S. Hall*, for the Appellant:—

Apart from the Act of 1883, the Plaintiff has no shadow of a case, for he would have to shew that the threats were made without reasonable and probable cause. Now the Plaintiff's and the Defendant's articles are so much alike that it would be absurd to say that the Defendant had no reasonable ground for his threats.

[*Finlay*, Q.C.:—The Plaintiff admits that.]

Then we have a clear case. The tap-unions of the Plaintiff are substantially the same as one of those described in the Defendant's specification. The Plaintiff therefore has made out no *primâ facie* case that the threats are not warranted, and the Vice-Chancellor was wrong in granting an interlocutory injunction on the mere consideration of the balance of convenience and inconvenience. He, in fact, granted an injunction without any case being made for it, merely on the ground that it would do the Defendant no harm. Moreover, we have commenced an action against the *Manchester Plumbing Company* for infringement on the ground of their selling the Plaintiff's tap-unions,

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expressing any opinion upon whether there is or is not any infringement, I have now only to consider what is the balance of convenience or inconvenience in granting or refusing the application. It appears to me that, having regard to the circumstance that the Defendant undoubtedly stands in a high position from having an extensive trade which has been existing ever since 1879, the course of action which he has adopted in not only sending out this circular, but sending travellers to people carrying on business in different places, threatening them with the difficulties into which they will get if they deal in the Plaintiff's articles, is a course which will have most serious consequences to the Plaintiff, because the Plaintiff's patent being comparatively a new one may be for all practical purposes utterly annihilated and destroyed, though at the hearing it may be shewn not to be an infringement of the Defendant's patent, and thus a good patent might be strangled in early life.

On the ground, therefore, of the balance of convenience and inconvenience I have no doubt that the application now made is one that I ought to assent to, and that there ought to be an order made in the terms of the notice of motion.

and that action under the proviso takes the case out of sect. 32. The order ought to be discharged.

Finlay, Q.C., and *Bousfield, contrà*:—

The principle of our tap-union is different from the Defendant s, and there is no ground for saying that the Plaintiff's articles are an infringement of the Defendant's patent. Then as regards the proviso, we say that the Defendant cannot defeat our action by commencing an action for infringement against somebody else after the commencement of our action. If the Plaintiff's action was rightly commenced, it cannot thus be made bad *ex post facto*. Moreover, we say that the Defendant's action was not commenced with due diligence. The Defendant had known of the sale of our tap-unions for more than a twelvemonth.

[COTTON, L.J.:—Is not the time of making the threats the time to be looked to in considering whether there is due diligence?]

It may possibly not be necessary that an action, in order to satisfy the proviso, should be brought against the party complaining, but we contend that after a party aggrieved has commenced an action under sect. 32 the proviso is not satisfied by an action subsequently brought against some one else.

[COTTON, L.J.:—Suppose the party aggrieved is a patentee who does not manufacture, but only grants licenses. How can an action be brought against him?]

At all events, the Plaintiff ought to be joined, the present action is suspicious. We believe that it was merely instituted to defeat the Plaintiff's action, and will not be prosecuted.

[*S. Hall*:—The Defendant's action was not brought against the Plaintiff because it was not known whether he was a person of substance. We chose a substantial defendant who was sure to be able to pay costs.]

The Defendant went about for a long time threatening actions, but never took any step against infringing till we had commenced proceedings, that is a reason for considering his action as not brought *bonâ fide*. The action ought to be one in which the question whether our patent infringes the Defendant's rights

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can be fairly tried, which it cannot be in an action to which we are not parties. It has been decided that the question whether the Defendant's patent is valid cannot be raised in an action to restrain threats: *Kurtz* v. *Spence* (1), though *Walker* v. *Clarke* (2) has been referred to as throwing some doubt upon it.

Moulton, in reply:—

It cannot be alleged that we threatened before March last, but we say that the circular of that month was not a threat within the meaning of the Act, it was nothing but a general warning to the public that proceedings would be taken against any one who infringed the Defendant's patent rights. A threat to come within the Act must be pointed at some particular person, or at some particular manufacture. No threat to any individual is shewn before the 24th of May, and our action was commenced with reasonable diligence after that, and, indeed, even if the threats be carried back to March, the time is not too long.

1887, July 22. COTTON, L.J.:—

This is an appeal by the Defendant against an interlocutory injunction granted by the Vice-Chancellor of the county palatine restraining him from continuing to issue threats against persons who, as he alleged, were infringing his patent.

The facts may be shortly stated. In the year 1879 the Defendant obtained a patent for improvements in junctions joining a hose to a tap. [His Lordship here briefly stated the nature of the invention.] The Defendant has ever since been manufacturing and selling articles made in accordance with this patent.

In the year 1886 the Plaintiff took out a patent for a similar tap-union, there being this difference, that the inner surface of the india-rubber ring was in the Plaintiff's tap-union slightly sloping.

In March, 1887, the Defendant, hearing of the sale of tap-unions made according to the Plaintiff's patent, and considering that they were infringements of his patent, issued a circular warning people against purchasing tap-unions which infringed his patent, stating that those who used them would be liable just as much as if they sold them, and threatening legal proceedings against all infringers. It was contended that the Defendant had at an earlier period threatened legal proceedings, but the evidence in support of that contention is so very indefinite, that I do not think we can rely upon it as establishing that there had been threats previous to March, 1887.

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(1) 33 Ch. D. 579.

(2) 4 Rep. Pat. Cas. 111.

In June, 1887, the Defendant brought an action for infringement against the *Manchester Plumbing Company*, who were among the persons whom he had threatened with legal proceedings. He brought that action just after the writ in this action had been issued by the Plaintiff, but before that writ had been served, and I think we must assume that the Defendant, when he commenced his action for infringement, did not know that the Plaintiff had issued his writ in this action, there being nothing to shew that the Defendant had any notice of it.

In that state of things an application was made to the Vice-Chancellor in this action, and he granted an interlocutory injunction against which this is an appeal.

Now what was the law independently of the Act of 1883, on which the Plaintiff relies, and on which the Vice-Chancellor based the injunction. It is thus stated by the late Master of the Rolls in *Halsey* v. *Brotherhood* (1): "It is quite clear that Mr. Justice, now Lord, *Blackburn*, in delivering judgment, considered that to support the action" (which was an action for similar threats to these), "the allegations must not only assert the statement to be untrue, but that it was made without reasonable and probable cause. That is the judgment of the full Court, and it appears to me that is the substance of the law. A man merely giving notice that his rights are being infringed, believing that they are infringed, is not to be subjected to an action for giving that notice, ... even although he does not follow up that notice by bringing an action at law for the infringement." I take that to be a correct statement of the law as it existed at the time of the passing of the Act, and if it were not for the Act I do not see that the Plaintiff here could have any reasonable ground for commencing this action or for applying for an injunction. The Defendant had been in possession of his patent since the

(1) 15 Ch. D. 514, 519.

year 1879, and had made and sold the articles manufactured in accordance with it, and those manufactured by the Plaintiff are so similar to them that certainly there was a reasonable ground for the contention that the articles made by the Plaintiff were an infringement of the Defendant's patent.

The question, however, turns on the 32nd section of the *Patents, Designs and Trade Marks Act*, 1883: that section consists of two parts; it contains directions as to what circumstances will enable a person who is in the same position as the Plaintiff here to obtain judgment in an action, and then it contains a proviso which excepts from the section cases which come within the proviso. If, then, a case comes within the proviso it must be dealt with as if this section did not exist, that is to say, it must be dealt with under the old law.

As the first part of the section has been a good deal discussed, it may be desirable to give our opinion upon it without regard to the proviso. First of all, this appears on the face of the section, that what it contemplates is the final judgment that is to be given in the action if the circumstances bring the case within the Act. That appears from this, that the section states that an injunction may be granted, and also damages, which evidently could not be obtained on an interlocutory application. Although undoubtedly the right of the Plaintiff to an interlocutory injunction will depend on what judgment he could get at the hearing of the action, yet we must remember that the object of the section is to provide for the judgment to be given at the trial of the action. First of all it says that when a person claiming to be entitled under a patent threatens any other persons with legal proceedings or liability in respect of the patented invention, then any person aggrieved may bring an action against him. In the present case, though it is very questionable whether the circular was a threat within the meaning of this section, the Defendant undoubtedly did, before this action commenced, threaten with action and legal liability those who were using the instruments made by the Plaintiff. He, therefore, has done that which is pointed out by the section. Who, then, can apply to restrain him? Any person aggrieved. And there is no doubt here that the Plaintiff is a person aggrieved, because he was making that which was said to be an infringement, and, of course, these threats or notices would stop the sale of the instrument which he made. Then the section goes on to say what may be granted—an injunction and damages, if the alleged manufacture, use, sale or purchase to which the threats related was not, in fact, an infringement of any legal rights of the person making such threats. Now I think that at the trial of such an action as this, the Court, before it can grant relief, must be satisfied that the article in respect of which the threats were made is not an infringement. I do not go into the question as to where the burden of proof will lie; that will depend upon the circumstances of each case. *Primâ facie* the Plaintiff would have the burden thrown upon him. He may easily rebut that in a particular case and throw the burden of proof on the Defendant. But in my opinion, in order to act on this section, the Court must be satisfied at the hearing of the action that the articles in respect of which the threats were made are not "an infringement of any legal rights of the person making such threats." The question, therefore, whether the patent of the person making the threat is a valid patent, must, in my opinion, come into consideration if the Plaintiff in the action seeks to have it considered, because I cannot see how, if the patent is invalid, there can be any act done in infringement of a legal right of the patentee. I mention that because, as I understand, though the case is not before us on appeal, Mr. Justice *Chitty* has intimated an opinion that the question of the validity of the patent could not come in question in an action like this. In my opinion, and after the discussion we have had I am bound to state it, the validity of the patent could come in question. In order that the Court may be satisfied whether there is or is not an infringement of any legal right, one of the questions must be, if the Plaintiff chooses to raise it, whether the Defendant's patent is or is not valid. That is the view of the statute which I take as regards the rights of the parties at the hearing independently of the proviso.

I think, however, that before going to the proviso I ought, having regard to the judgment of the Vice-Chancellor, to state my opinion as to how the matter ought to be dealt with on an interlocutory application. As far as I understand the Vice-

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Chancellor, he seems to have considered that he could not enter or that he need not enter at this stage of the cause into the question whether the sale of the Plaintiff's tap-unions was an infringement of the Defendant's patent, or whether that patent was a valid patent, and that all he need consider was the balance of convenience and inconvenience as between these parties in granting or refusing the interlocutory injunction. I must express my dissent from that view. It is very true that in all cases of interlocutory injunction the Court does consider and ought to consider the balance of convenience and inconvenience in granting or refusing the injunction. But there is another very material question to be considered, has the Plaintiff made out a *primâ facie* case? That is to say if the evidence remains as it is, is it probable that at the hearing of the action he will get a decree in his favour? Therefore, although I quite agree that the Court ought not on an interlocutory injunction to attempt finally to decide the question whether the act complained of is an infringement, or (if the question of the validity of the patent is raised) whether the patent is a valid one or not, yet in my opinion it ought to be satisfied that on one or both of those two points the Plaintiff in the action has made out a *primâ facie* case, and unless the Court is so satisfied it would be wrong to grant an injunction, merely on the ground that it cannot do the Defendant any harm. Injunctions ought to be granted only on a case made out entitling the Plaintiff to that particular remedy. I have thought it right to express my opinion on this point, having regard to the judgment of the Vice-Chancellor and to the judgment of Mr. Justice *Kay*, on which he appears to have relied. In the present case, if it were necessary to consider the point, I should say that no doubt there was *primâ facie* evidence on behalf of the Defendant that this was an infringement. The question is also raised by the Plaintiff that the patent is a bad one, and that therefore there can be no infringement. If I had not come to the conclusion that the case is entirely taken out of the section by means of the proviso, I should have had to consider whether the Plaintiff had made out a *primâ facie* case that the patent is invalid. I have not considered the evidence on that point in such a way as to make it right to give any opinion on its effect, as I think that the proviso in this case settles the matter.

Now, what is the proviso? "Provided that this section shall not apply" (that is, that the old law alone shall apply to such an action) "if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." Now, what has been done here? Just after this action was commenced, but before there was notice of it to the Defendant, an action was commenced by the Defendant against the *Manchester Plumbing Company* for infringement. Was it commenced with due diligence? Mr. *Bousfield* contended that the action must be commenced with due diligence from the time when the Defendant first knew that the Plaintiff was doing what the Defendant alleges to be an infringement. I cannot agree with that view. In my opinion an action must be held to be commenced with due diligence if commenced within a reasonable time after the threats have been made, for the threats are the only matter complained of. Now, assuming the threats to have been made in March, the action against the *Manchester Plumbing Company* was in my opinion commenced with due diligence after the time when the Defendant first issued these threats, for I think that the interval between March and June is not an unreasonable time for a man to take to consider whether he should bring an action in respect of a supposed infringement of his patent. Therefore I think that the proviso is satisfied so far as regards its requirement that the person making such threats with due diligence commences an action. The requirement that the action must be prosecuted with due diligence relates to a matter *in futuro*.

Now, it is said that the action by the Defendant against the *Manchester Plumbing Company* is suspicious. I asked Mr. *Finlay* what he meant by "suspicious"—what it was that he suspected. He said it was very extraordinary that an action should be brought against the *Plumbing Company* and not against the Plaintiff. Reasons were given for that, but I do not rely upon them. The *Plumbing Company* were actually selling the very articles complained of by the Defendant; it is indisputable that if the Plaintiff's articles were an infringement of the Defendant's patent the company were infringing it; and it is remarkable that though in April the Plaintiff's solicitor wrote to the Defendant complaining of the circulars, I cannot see in that letter any admission that the Plaintiff was making and selling these articles, though he does refer to the Plaintiff's patent. But merely having a patent for a thing which, if made, will be an infringement of a prior patent, would not enable an action for infringement to be brought. To my mind, then, there is nothing suspicious in the action being commenced against the *Plumbing Company*, and there is no affidavit by which anyone pledges his belief either that the action has been brought collusively or that the defendant in that action will not defend his position. In my opinion, upon an interlocutory application, we ought not to come to the conclusion that that action is not sufficient, and is to be disregarded. Supposing the Defendant does not duly prosecute his action as against the *Plumbing Company*, or if that action is not really defended, or if the defence is abandoned, the Plaintiff in this action may apply again for an injunction. It is my opinion, and I ought to express it, that in order to bring the case within this proviso the action must be an honest action, an action honestly brought in order to test the validity of the patent or the fact of infringement, whichever may be in question. If by arrangement between the parties to such an action the real question is not tried, then the matter will stand very differently. But there is nothing here to induce the Court to come to the conclusion that the Defendant's action has not been honestly brought or will not be defended. Nothing would be easier than for the Plaintiff in this action to go to the Defendants in *Royle's* action and say, "I am the person substantially interested in this case; you may not like to go to the expense of defending this action; let me defend it in your name on my giving you a sufficient indemnity." What may happen in that action is a matter for the future, but at present I see no reason whatever to suppose that it is not an honest action honestly brought, or that it will not be honestly defended.

Then we come to what really is the main difficulty of the proviso—the question against whom an action must be brought to bring the case within this proviso. It was contended by the Plaintiff that it ought to be brought against the person aggrieved, that is to say against the person applying for an injunction under this section, and that *Royle's* action having been brought only against one who is buying from the Plaintiff and selling to retail purchasers does not satisfy the requirement of the proviso. In my opinion it is not necessary that the action should be brought against the person aggrieved. As I pointed out, and I did not get any answer which satisfied me, it would not always be possible that an action should be brought against the person aggrieved. The patentee of a rival machine would necessarily be, as the Plaintiff here is, a person aggrieved within the meaning of the section, but supposing he does not himself manufacture or sell, but only licenses the manufacture and sale, I do not know any means of bringing an action against him. It might be argued that his taking out a patent was proof that he threatened and intended to use his invention; but in my opinion that would not be sufficient ground for an application for an injunction; and how could damages be obtained from him? I am disposed to think that what the section points at is a case where some act has been actually done which can be tested as to whether or not it is an infringement, for the words "if the alleged manufacture, use, sale, or purchase, to which the threats related was not in fact an infringement of any legal rights of the person making such threats," clearly point to an article having been made which has been alleged to be, but as a matter of fact is not, an infringement of the patent of the person issuing the threat. In my opinion the mere fact that where the owner of a rival patent is the aggrieved person it is in many cases impossible that an action for infringement should be brought against him, precludes us from confining the action mentioned in this proviso to an action against the aggrieved party. In my opinion the proviso is satisfied if an action to test the validity of the patent or the fact of infringement is honestly brought with reasonable diligence against the person or any of the persons to whom the threats have been made. I am not satisfied that the Legislature did not intend to lay down the following up the threats by an action as a sort of test whether the threats were *bonâ fide*, as Vice-Chancellor *Malins* did in *Axmann* v. *Lund* (1). In that case an action was brought to restrain threats, and the Vice-Chancellor asked the defendant who was issuing those threats whether he would undertake to bring an action for infringement. He declined to do so, and the Vice-Chancellor granted an injunction, it being recited in the order that the defendant declined to bring an action following up the threats. I think that is very likely what the Legislature intended; but all we have to do is to see what is required by this proviso. In my opinion it is not required that the action should be brought against the aggrieved person: it is sufficient if the action is brought against any person to whom the threat has been made. That is the case here. I see no ground for supposing that the action is collusive, or that it will not be defended in a proper manner. If it is not, another application can be made, for we are not now at the trial of the action, but are only asked to grant an interlocutory injunction on the facts before us before the rights of the parties have been decided.

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(1) Law Rep. 18 Eq. 330.

On the facts before us I say that, *primâ facie*, there is such an action as, by virtue of the proviso, takes the case out of the section. Therefore, in my opinion, the order made was wrong, and must be discharged.

BOWEN, L.J.:—

I am of the same opinion.

This is an action brought under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883. We have in the first place to construe the proviso in order to determine whether an action which has been instituted against the *Manchester Plumbing Company* is an action which satisfies the description given in the proviso of an action commenced with due diligence for infringement of the Defendant's patent. It seems to me that in order to construe the proviso we must form an intelligent view of the whole section, and although the construction which I put on the earlier part of the section may perhaps on another occasion be called in question, I desire to say that in my view it throws a distinct light upon the construction of the proviso. The section gives for the first time a new right of action, a right of action to a person who is aggrieved by a threat proceeding from a patentee against somebody in respect of an alleged manufacture, use, sale, or purchase of the patentee's invention. I think those words indicate that the threat, which is to be the subject-matter of the action, must not be merely a warning about something that is going to be done, but must be a threat about an act done, a threat of legal proceedings or liability in respect of an alleged manufacture, use, sale, or purchase of the invention, not in respect of a proposed manufacture, use, sale, or purchase. It seems to me that that interpretation is confirmed by the subsequent language in the section, where the words employed are that an injunction and damages may be obtained if the alleged manufacture, use, sale, or purchase was not in fact an infringement, the condition imposed under the word "if" pointing, it seems to me, to an act done which is alleged by the patentee to be an infringement, but which may not really be an infringement. Again, when you come to the proviso you find that an action for infringement of the patent is to be the means by which the section may be avoided, implying, I think, that there has been something done which is asserted to be an infringement of the patent. I think, then, that threats would not fall within the section if they were mere threats or warnings as to something which might be done in the future. Everybody, it seems to me, has still a right to issue a general warning to pirates not to pirate, and to infringers not to infringe, and to warn the public that the patent to which the patentee is entitled, and under which he claims, is one which he intends to enforce. But my language upon this point must not be misunderstood. It does not follow that because a threat is so worded as grammatically to apply only to the future, therefore it may not in any particular case be in substance and in fact applicable to what has been done. Suppose that a manufacturer is making and issuing machines which the patentee considers to be an infringement of his patent, and the patentee issued a threat really directed against the manufacture and sale of those machines, I do not think that he could escape from the section by wording his notice in such terms that according to the letter it was only a general warning to all persons not to infringe his patent.

Now I am not satisfied (though I give no final opinion on the point, as its investigation would require further evidence) that the circular which has been issued was directly addressed to the sale

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of this particular instrument of which the Defendant complains. I think it very probable that it was, but I do not pronounce judgment on the basis that that circular is a threat upon which this action can be founded. But there was a very distinct and definite threat, which puts the matter beyond all question, addressed to the *Manchester Plumbing Company*, who, though not the Plaintiffs in the action, are persons who sell the very instruments which the Plaintiff has patented, and the sale of which is complained of by the Defendant. This threat to the *Manchester Plumbing Company* was addressed to people who had done something which was complained of as an infringement. The true view of the proviso seems to me to be that an action will satisfy the words of the proviso if it is a *bonâ fide* action, brought with due diligence and without collusion, against a person to whom a threat has been addressed in respect of the act to which the threat referred. I do not express any opinion as to whether any other sort of action would or would not satisfy the proviso. It is sufficient for me to say that in my opinion such an action would be enough to bring the case within it.

It was urged upon us that the action must be against the person aggrieved, and that it will not do if it is simply brought against a person who is threatened. I think that construction can hardly be put upon the section. The person aggrieved may have done nothing which could be alleged to be an infringement; he may be only a person who is intending to manufacture, or, what is still more probable, he may be a person who is dealing with his own patented invention through the medium of licences to others. It can hardly be said that a patentee who intends to grant licences to make and sell his invention is not seriously aggrieved if persons who have contracted or negotiated with him for licences are deterred by the threats of another patentee from utilizing his invention. Yet he cannot be sued for infringement, and if the proviso were held to apply only to actions brought against the person aggrieved, the proviso would have no application at all in an action brought by him for an injunction against the threats. On the ground therefore that this action against the *Manchester Plumbing Company* is an action brought with due diligence against persons who were threatened in respect of an act done by them which is alleged by the Defendant to be an infringement of his patent, and is an action brought in respect of the very class of goods which are made by the Plaintiff, it seems to me that the Defendant's action takes the case out of the section.

But I think it also right, as the matter has been discussed, and as the Vice-Chancellor's judgment proceeds upon another ground, to express my concurrence in what the Lord Justice has said first as to the necessity in matters of this sort that those who apply for an interim injunction should fulfil the ordinary requirements of the law and make out a *primâ facie* case, not merely a *primâ facie* case of balance of convenience and inconvenience, but a *primâ facie* case of a right which is infringed. The right conferred by this section is a right not to be threatened if the manufacture which is complained of was not in fact an infringement, and I think a person applying for an injunction against threats ought to make out a *primâ facie* case that the matter to which the threats related was not in fact an infringement.

I also wish to add that, though I am always extremely reluctant to travel one hair's breadth out of the case before us, I think it is necessary to express an opinion, not a final judgment, that in an action of this nature the question of the validity of the Defendant's patent may be raised. Mr. Justice *Chitty* seems to have come to a different conclusion; but I think it is well worthy of consideration how it is possible to decide the question whether a manufacture was an infringement of the legal rights of a patentee without considering whether he had any legal rights at all. I therefore, as at present advised, do not feel able to follow Mr. Justice *Chitty's* view upon that point. These two matters, I think, it is necessary to mention, in consequence of the judgment of the Vice-Chancellor and of the course which the argument before us has taken; but we decide the case on the ground that the action against the *Manchester Plumbing Company* is a sufficient action to satisfy the proviso and so take the case out of the 32nd section.

Solicitor for *Royle: A. Macdonald Blair, Manchester.*

Solicitors for Plaintiff: *Bolton, Robbins, Busk & Co.*, agents for *C. R. Hardman, Manchester.*

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NORTH, J.

May 2, 5, 26.

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July 27.

BOSWELL *v.* COAKS.

[1881. B. 363.]

Practice—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-rr.* 29, 48—*Costs of Separate Defences—Taxing Master's Discretion—Refresher.*

An action to set aside, on the ground of fraud, the sale of a life interest to *C.* and *B.*, on behalf of themselves and four other Defendants, was dismissed by the House of Lords with costs, and it was ordered that in taxing the costs the Taxing Master should consider whether any of the Defendants who appeared separately had sufficient reason for severing, and if and in so far as it should appear that they had not, then the Taxing Master should allow only one set of costs, or only as many sets of costs as he should think right. The Taxing Master allowed the six Defendants costs of separately defending:—

Held, by *North*, J., that there was no appeal from the discretion of the Taxing Master:

Held, on appeal, that as the House of Lords had delegated to the Taxing Master the decision of the question how many sets of costs should be allowed, no appeal would lie from his decision unless he altogether omitted to exercise his discretion.

A trial lasted four days and three hours; on the fifth day the Judge required further hearing on one point, which occupied the whole of a subsequent day. Refreshers for such subsequent day were allowed.

THIS was an action brought by some of the creditors of Sir *Robert J. H. Harvey*, deceased, on behalf of themselves and the other creditors, to have a sale of a life interest belonging to the estate of Sir *Robert J. H. Harvey* set aside on the ground that it had been made under an order of the Court to two persons, one of whom was in a fiduciary position to the trust estate, and that a proper disclosure of the facts had not been made. The sale was made to *Isaac Bugg Coaks* and *Charles John Bunyon*, the two first Defendants on the record; they bought for themselves and four other persons who were made Defendants, namely, Messrs. *Bailey*, *Cadge*, *Watson*, and *E. K. Harvey*, who were made Defendants. There were other Defendants who were formal parties. The trial took place before Mr. Justice *Fry*; it occupied the whole of the four days, the 26th and 27th of February, and the 5th and 6th of March, 1883. On the morning of the fifth day of trial, the 12th of March, 1883, Mr. Justice *Fry* stopped counsel for the

Defendants, and, without calling for any evidence on their part, decided in their favour (1); the completion of the trial and judgment occupied about three hours on that day, that is to say, till the adjournment of the Court in the middle of the day. In the afternoon his Lordship said he desired to hear evidence and further argument on a point he had not sufficiently considered, and fixed the 19th of March, 1883, for the further trial. The whole of that day was occupied with the case, and, in the result, his Lordship adhered to the opinion he had formed, and gave judgment for the Defendants, with costs. The Plaintiffs appealed, and the Lords Justices reversed the decision of Mr. Justice *Fry* (2). The Defendants appealed to the House of Lords. In the House of Lords (3) the order of the Court of Appeal was reversed, and the order of Mr. Justice *Fry* was restored; and it was ordered that the Plaintiffs should pay the Defendants' costs, and it was further ordered that "in taxing the costs below, both in the High Court of Justice and in the Court of Appeal, the Taxing Master do consider whether any of the Defendants in the cause who appeared separately had sufficient reason for severing in their defences, and if and in so far as it shall appear that they had not, then the said Taxing Master shall allow only one set of costs, or only as many sets of costs as he shall think right," and the cause was remitted back to the Chancery Division of the High Court. By an order dated the 18th of July, 1886, the order of the House of Lords was made an order of the High Court.

The Taxing Master allowed a separate bill of costs to each of the Defendants, but disallowed certain items which he considered improper to be charged in respect of more than one Defendant.

The Plaintiffs objected to the Taxing Master allowing the Defendants *Bunyon, Coaks, Watson, Cadge,* and *Harvey,* and the representatives of *Bailey* (who was now dead) more than one set of costs between them, "Because 1. There was no conflicting interest between any of the Defendants and nothing to prevent one solicitor acting with consistency for all. 2. The Defendants employed one solicitor in the sale which was sought to be set

(1) 23 Ch. D. 302.
(2) 27 Ch. D. 424.
(3) 11 App. Cas. 232.

aside. 3. The Defendants employed one solicitor to conduct their appeal to the House of Lords, and put in a joint case, although appellants can appear there separately if there is any difference in their cases. 4. The Defendants severed their defences without sufficient reason, and it is not equitable that plaintiffs should be called on to pay the extra costs occasioned by such severance." The Master answered the objection: "I am much impressed by what is stated in these objections on the above point. But this action was very serious, both in respect of property and character, to these Defendants. They employed each of them his own solicitor, and I suppose they were entitled so to do. I therefore allow to each Defendant a separate bill of costs."

The Plaintiffs took out a summons to have the certificate of the Taxing Master reviewed in respect of the allowance of costs of separate appearance.

The summons came on for hearing before Mr. Justice *North* on the 2nd of May, 1887.

Cookson, Q.C. (*Langley*, with him), for the Plaintiffs:—

We admit that the two first Defendants, *Coaks* and *Bunyon*, are entitled to have costs of separate appearance, but the other four Defendants were in a similar position, and ought to have defended together; it was "over caution" within the meaning of Order LXV., rule 27, sub-rule 29, to appear separately.

Cozens-Hardy, Q.C., and *E. Beaumont*, for *Bailey's* executors (*Bailey* being dead); *Phipson Beale*, for *Harvey; Haldane*, for *Cadge*; and *Chadwyck Healey*, for *Watson*:—

There is a preliminary objection; the question whether the Defendants are entitled to costs of separate appearance is within the discretion of the Taxing Master, and there is no appeal from that discretion: *Beattie* v. *Lord Ebury* (1).

Cookson, Q.C., and *Langley*, for the Plaintiffs:—

It is a question of principle whether Defendants in such a case as this, who are not personally charged with fraud, are to be allowed the costs of separate appearance. The Taxing Master has not exercised a discretion; he seems to have considered that he was bound in all cases to give costs of separate defences, however unnecessary separate defences might be; he has not in fact carried out the direction of the House of Lords.

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(1) 43 L. J. (Ch.) 80; W. N. 1873, p. 194.

Cozens-Hardy, Q.C., and *Butcher*, for *Bunyon.*

Methold, for *Coaks.*

NORTH, J. :—

According to the ordinary rule of the Court these six Defendants are entitled to have separate costs of defending. To that rule there is an exception; in the case of co-trustees not acting together, but severing in their defences, a practice exists of not allowing separate sets of costs unless the Court gives a direction that that should be done. The only other exception that I know of is that under the old Order XL., rule 12, of the Consolidated Orders; where the same solicitor was employed for two or more defendants, the Taxing Master was to consider whether separate answers or proceedings were necessary or proper, and if he was of opinion that the costs of separate answers or proceedings had been improperly incurred the same were to be disallowed. That was the adoption in 1860 of a rule of an earlier date going back as far as 1828. That was also an exception to the general rule; it enabled the Court in cases where one solicitor had acted for more than one defendant to consider the question whether it was reasonable that more than one set of costs should be allowed; it introduced a new practice applicable to that particular case: it left the rule as to other cases where it was. That rule did not enable the Court to dictate to parties then entitled to appear by different solicitors that they should employ the same solicitor. Every defendant had a right to appear by a separate solicitor, but what the Court said was that if the defendants were co-trustees or appeared by the same solicitor they should not necessarily have the costs of separate appearance. That rule came before the Court in the case of *Beattie* v. *Lord Ebury* (1). In the report of the case in the *Law Journal* (2) the facts are not very fully stated; they are more fully given in the *Weekly Notes* (1). From that report it appears that a bill having been filed against directors of a railway company, the company and the secretary, separate answers were put in by the directors and the secretary appearing by the same solicitor. That fact does not appear in the other report. By the decree the bill was dismissed with costs against the defendants. In taxing the defendants' costs the Master allowed only one set of costs; a summons was taken out to review the Taxing Master's certificate. The Vice-Chancellor said "that the point was clearly covered by the terms of the rule, and that on the ground that there was no appeal against the exercise of the Master's discretion in the matter, the application must be refused with costs."

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(1) 43 L. J. (Ch.) 80; W. N. 1873, p. 194.

(2) 43 L. J. (Ch.) 80.

In that case the Court held that there was no appeal from the discretion of the Taxing Master. The rule on which it was decided is not in force at present, and in addition to the rule, Order LXV., rule 27, sub-r. 8, which has been substituted for it, there has been added rule 27, sub-r. 29, of that Order, which provides that costs are not to be allowed "which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party."

Now the words on which Mr. *Cookson* relies are "incurred through over caution." It seems to me that the discretion by that rule is a discretion in the taxing officer. No doubt if he has gone wrong on a matter of principle the Court can review his decision.

The application is to review the decision of the Taxing Master on the ground that he ought to have allowed one set of costs only to the six Defendants; but that is now given up as to *Coaks* and *Bunyon*. The decision, therefore, must be upheld at all events as to two Defendants; and as to the others it clearly cannot be said they are to have no costs. The only question then is, are they to have one set, or are they all to have separate costs, or are they to be grouped. Now it seems to me this is a matter in which the Taxing Master has a discretion given him both by the rules and by the order of the House of Lords. The objections here taken to what the Taxing Master had expressed his intention of doing were full and clear, and his attention was called to this, and he dealt with them.

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(1) W. N. 1873, p. 194.

In my opinion the Taxing Master clearly took the right view: he considered it was open to the parties to appear separately; though he thought that separate costs ought to be allowed, he intimated that there were separate items in respect of which separate costs ought not to be allowed, and he disallowed such items. When the matter came before him again, and his attention was called to the objections he gave his answer: "I am much impressed by what is stated in these objections on the above point." Now that being so, it is said by Mr. *Langley* that, having regard to the terms of the order of the House of Lords, he has not properly taken into consideration the direction in that order. It seems to me he has fully considered the matter, and I cannot hear it said that he has not. The objection was that he ought not to have allowed more than one set of costs; not that he had not fully considered the matter. The Taxing Master said he had fully considered the objections, and he goes on to say: "the action was very serious both as to character and property," and beyond dispute it was very serious. Then he goes on to say: "they have employed each of them his own solicitor, and I suppose they were entitled so to do." It seems to me he has exercised his discretion after full deliberation, and it is not open to review. If it were, my discretion is equally open to be reviewed by the Court of Appeal, and the opinion of the Court of Appeal could be equally open to be reviewed in the House of Lords. If it had been the view of the House of Lords that the matter could be brought before them again, I think they would have dealt with the question at the time. The Court of Appeal frequently does deal with the question whether two sets of costs are to be allowed. I have a distinct recollection of one case of an appeal from the Court of the Chancery of the County Palatine of *Lancaster*, where that was done. If it were the view of the House of Lords that the House itself might have to deal with the question, I think instead of referring it to the Taxing Master, they would have dealt with it at the time. Under the circum-

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stances I am of opinion that there is no appeal from the discretion of the Taxing Master, and he has not gone wrong on any matter of principle. The summons must therefore be dismissed with costs.

The Taxing Master allowed refreshers for four days, and disallowed refreshers for the sixth day of hearing. The Defendants carried in an objection to the taxation on the ground that this being a witness case, and having lasted four and a half days in the first instance, and another day on the rehearing, five refreshers to counsel ought to be allowed, and that such counsel were entitled to a fee on the case being re-opened, after once being disposed of, either by name of refresher or at least as a fee to hear judgment. The Taxing Master answered the objection as follows: "The last daily refresher was disallowed, because the attendance in Court last previous to payment of this refresher had lasted less than five hours. The wording of the Order LXV., rule 27, sub-r. 48, of the Rules of the Supreme Court, 1883, which is declaratory of the former practice, shews clearly that the refresher ought not to have been paid."

The Defendant *Bunyon* had taken out a summons to review the certificate in respect of (among other items disallowed) the refreshers for the last day.

Cozens-Hardy, Q.C., and *Butcher*, for *Bunyon* :—

The rule as to five hours applies only to the first part of the hearing; it is considered that the fee on the brief carries a second day of the trial, provided that on the first day the trial has lasted less than five hours; after that counsel are entitled to refreshers for every day the cause comes on. In this particular case the disallowed refresher was in effect in respect of the opening of a second trial.

Cookson, Q.C., and *Langley*, for the Plaintiffs :—

The meaning of the rule 27, sub-r. 48, of Order LXV., on which the Taxing Master has acted, is that unless the previous part of the trial for which either the original fee ran, or a refresher has been paid, lasted five hours the last fee paid continues to run. There is no distinction drawn between the first day's hearing and any other day's hearing.

NORTH, J.:—

In my opinion the Taxing Master has gone wrong in principle on this point, as he has disallowed refreshers for the sixth day of trial when he ought to have allowed proper refreshers. I say nothing about the amount. He has gone on the basis of Order LXV., rule 27, sub-r. 48, which was not in existence at the time the action was tried. He says, "The last daily refresher was disallowed, because the attendance in Court last previous to payment of this refresher had lasted less than five hours." In point of fact it had lasted from the sitting of the Court till the time the Court rose for luncheon. Then he says the wording of the Order LXV., rule 27, sub-r. 48, of the Rules of the Supreme Court, 1883, which is declaratory of the former practice, shews clearly that the refreshers ought not to have been paid. In the first place it does not appear to me that the rule is declaratory of the former practice, and in the second place I cannot spell out that if it had applied this refresher would have been properly disallowed. It seems to me a case in which a fresh start was made, and refreshers ought to be allowed.

D. P.

The Plaintiffs appealed from this decision as regarded the allowance of four several sets of costs to the Defendants other than *Coaks* and *Bunyon*, and the appeal was heard on the 27th of July, 1887.

Cookson, Q.C., and *Langley*, for the Appellants:—

There was no occasion for the four Defendants who were not personally charged with fraud to appear separately from each other. They were precisely in the same position and ought to have appeared together.

[BOWEN, L.J.:—Has not the House of Lords delegated its jurisdiction as to costs to the Taxing Master?]

Supposing that to be so, the Taxing Master has given a wrong reason for his decision. None of these four Defendants were in any way implicated in the charges on the ground of which it was sought to set aside the sale, and the action therefore in no way affected their characters. As the Taxing Master has given a wrong reason he cannot be considered to have exercised his discretion so as to make his decision final: *In re Martin* (1).

[*Van Sandau* v. *Moore* (2) was also referred to.]

Cozens-Hardy, Q.C., and *E. Beaumont*, for *Bailey's* executors, *Phipson Beale*, for *Harvey*, *Haldane*, for *Cadge*, and *Chadwyck Healey*, for *Watson*, were not called upon.

COTTON, L.J.:—

In my opinion the decision of Mr. Justice *North* was right. This is not an ordinary case. After the appeal had been disposed of by the House of Lords a special application as to costs was made to the Appeal Committee. The Appeal Committee declined to decide it, and said in substance, "The question depends on details which are not before us, we will not decide it, we will delegate the decision of it to the Taxing Master." An order was accordingly made that in taxing the costs below the Taxing Master should consider whether any of the Defendants who appeared separately had sufficient reason for severing in their defences, and if and in so far as it should appear that they had not, then the Taxing Master should allow only one set of costs or only as many sets of costs as he should think right. There is therefore no appeal unless the Taxing Master has failed to exercise his discretion at all. This case differs from a case where though an order is appealable the Court of Appeal will not generally interfere with the exercise of the discretion of the Judge in the Court below unless he has gone on a wrong principle. In the case cited the order was appealable, and as the Judge had exercised his discretion on a wrong principle, the appeal was entertained. In the present case there is no appeal unless the Taxing Master has not exercised his discretion at all. The Taxing Master was not bound to say as much as he has done,

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(1) 20 Ch. D. 365.

(2) 1 Russ. 441.

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but what he says does not give any ground for saying that he has not exercised his discretion. The appeal therefore fails.

BOWEN and FRY, L.JJ., concurred.

Solicitors for Plaintiffs: *Whites & Co.*, agents for *M. S. Emerson, Norwich.*

Solicitors for Defendants: *Johnson & Master*, agents for *Coaks, Rackham & Cooper, Norwich; Smythe & Brettell; G. F. Hudson, Matthews & Co.*, agents for *Bailey, Cross, & Barnard, Norwich; Blake & Heseltine*, agents for *Field, Son, & Pully, Norwich; Aldridge, Thorn & Morris*, agents for *Copeman & Cadge, Loddon; S. W. Johnson & Son.*

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[1886 R. 640.]

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Practice—Service out of the Jurisdiction—Contract to be performed within the Jurisdiction—Rules of Supreme Court, 1883, *Order* XI., *r.* 1; *Order* II., *r.* 5—*Appendix A., Part I., Form* 9.

R., an American, residing in *England* for the purposes of his business, brought an action against *C.*, an American resident in *America*, to enforce a contract by *C.*, made in *England*, to transfer to *R.* shares in an English company. *Bacon*, V.C., gave leave to issue the writ, and serve notice of it in *America*. More than a year afterwards the Defendant, without giving any sufficient reason for his delay, applied to discharge the order for service on the ground that there were incorrect statements in the affidavit on which it was obtained; that the order giving leave, though noted on the writ, was not mentioned in the notice; and that there was no jurisdiction to order service abroad, as the contract was not one which according to its terms ought to be performed within the jurisdiction:—

Held, that Order XI., r. 1, sub-sect. (*e*), does not require that a contract should state in terms that it is to be performed within the jurisdiction, but that it is enough if it appears, from a consideration of the terms of the contract and the facts existing when the contract was made, that it was intended to be performed within the jurisdiction.

Held, that a contract made in *England* to transfer shares in an English company to a person resident in *England* was a contract which, according to its terms, ought to be performed within the jurisdiction.

Held, that the omission to copy in the notice the order giving leave to issue the writ and serve notice of it, was not such an informality as to make the service invalid.

Held, that after the lapse of a year the Defendant was too late to raise

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any objection to the order on the ground that the affidavit on which it was obtained did not fairly state the facts.

Held, therefore (affirming the decision of *Kay*, J.), that the order for service abroad ought not to be discharged.

THE Plaintiff was an American who, though not domiciled in *England*, resided in *London* for the purposes of his business. The Defendant was resident in *America*.

On the 5th of August, 1881, the Plaintiff and Defendant being both in *London*, an agreement was entered into between them the terms of which, so far as it was to be performed by the Defendant, were embodied in the following letter, signed by him, and having the name and place of business of the Plaintiff at the head:—

"*London*, Aug. 5, 1881.

"Dear Sir,—Whenever the *United Horse Nail Company, Limited*, transfer to you and myself jointly the *J. A. Coleman* patents for improvements in horse-nail machines for the *U. S.* and *Canada*, so that we shall be jointly owners of record at the *Washington Patent Office*, I will transfer to you, or your order, 500 *Horse Shoe* shares.

"Yours, very truly,
"*J. A. Coleman.*"

The *Horse Shoe Manufacturing Company* was an English limited company.

On the 6th of April, 1886, the Plaintiff obtained from Vice-Chancellor *Bacon* an order giving him leave to issue his writ in this action for specific performance of the agreement, and for an injunction to restrain the Defendant from dealing with the shares, leave being at the same time given to serve notice of the writ on the Defendant in *America*. This was obtained on an affidavit by the Plaintiff, filed on the 5th of April, 1886, in which he stated that "the said contract, according to the terms thereof, ought to have been performed within the jurisdiction of this Court;" that the assets of the *Horse Shoe Manufacturing Company* had been subsequently purchased by the *United Horse Shoe and Nail Company*, which was an English joint-stock company; that this company had issued to *Coleman* 500 shares in lieu of his 500 shares in the *Horse Shoe Company*, and that he was now the registered holder of such 500 shares; that the Plaintiff had duly and long since performed his part of the contract, but that the Defendant had neglected and refused to transfer the shares in pursuance of the contract.

On the 19th of April, 1886, notice of the writ was served on the Defendant in *America*. In the margin of the writ was a memorandum, signed by the Chief Clerk, of the order of the 6th of April, 1886, but this memorandum was not copied on or referred to in the notice served. The memorandum was in this form: "V.C. *Bacon* at Chambers, 6th April, 1886.—Order made for leave to issue this writ, and for leave to serve notice thereof upon the Defendant at *Providence, Rhode Island*, or elsewhere in the *United States of America*; within twenty-eight days to enter an appearance thereto."

The Defendant entered no appearance, and did not deliver any defence.

On the 26th of June, 1886, the Plaintiff moved for judgment for default in delivering defence, and judgment was given with costs, ordering specific performance, and directing the Defendant to transfer the 500 shares.

On the 7th of June, 1887, the Defendant gave notice of motion to have the order of the 6th of April, 1886, discharged on the grounds that the affidavit on which it had been obtained contained incorrect statements as to the agreement sought to be enforced, and was untrue in stating that the contract was one which, according to its terms, was to be performed within the jurisdiction, and that the Plaintiff had duly performed the contract on his part; also on the ground that the Court had no jurisdiction to make the order: and to have the judgment set aside on the ground of the invalidity of the order of the 6th of April, 1886, and on the further ground that the notice of the writ contained no reference to that order.

The motion was heard before Mr. Justice *Kay* on the 1st of July, 1887.

Ince, Q.C., and *S. Dickinson*, for the motion, contended (1) that the Plaintiff's affidavit, upon which he obtained the order of the 6th of April, 1886, contained misstatements of fact; and (2) that the service of the notice of the writ was irregular, inasmuch as a copy of the order "indorsed" on the writ was neither made on the notice served, nor served with the notice. They referred to Rules of the Supreme Court, 1883, Order XI., r. 1 (*e*); Order II., r. 5; Appendix A., Part I., Form No. 9; Annual Practice, 1886–7 (1).

Marten, Q.C., and *Bramwell Davis*, for the Plaintiff, were not called upon.

KAY, J.:—

This is an application to set aside a writ which, under an order of the 6th of April, 1866, was issued by leave of the Vice-Chancellor *Bacon*, leave being also given to serve notice of the writ upon the Defendant in the *United States;* and the notice of motion also seeks to set aside a judgment in the action which was given on the 26th of June, 1886, in default of appearance. The notice of motion is dated the 7th of June, 1887; so that, a year after the judgment, and more than a year after the leave to serve the writ, the Defendant—the sole Defendant—comes to ask the Court to set aside the order giving leave to serve the writ upon him in *America*, and the judgment. The first ground for seeking to set aside the order is that the Plaintiff's affidavit upon which the order was obtained contains untrue statements.

One of the alleged untrue statements is the statement that "the said contract, according to the terms thereof, ought to have been performed within the jurisdiction of this Court." It is said that the contract was not a contract which, according to the terms of it, ought to be performed within the jurisdiction of the Court. It is admitted that the *Horseshoe Manufacturing Company, Limited*, is an English company, and that the contract was —as in fact appears on the face of it—a contract made in *London* on the 5th of August, 1881. So that a contract made in *London* between two persons then in *London* (one of them being still in *London* and resident in *London*) for the transfer of 500 shares in an English joint stock company has, it is said, been so untruly stated to be a contract which ought to be performed within the jurisdiction of this Court that, on that ground, the order for leave to serve ought to be set aside. My answer is, I do not agree to that.

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(1) Pages 126, 127.

[His Lordship then dealt with the objection that the Plaintiff's affidavit contained a misstatement that he had duly performed the contract on his part, and held, upon the facts, that the objection was unfounded. His Lordship proceeded:—]

Then it is said that the service of the notice of the writ was irregular. That depends upon the question whether the Rules of the Court have been complied with. The order which applies to the case is Order II., rule 5, which says: "A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction"—words that apply to this case—"shall be in one of the Forms, Nos. 5, 6, 7 and 8, in Appendix A., Part I., with such variations as circumstances may require. Such notice shall be in one of the Forms Nos. 9 and 10 in the same Part, with such variations as circumstances may require." I now turn to the Appendix A., Part I., Form No. 9, which is in these words: "To *G. H.*, of [blank]. Take notice that *A. B.*, of [blank], has commenced an action against you, *G. H.*, in the [blank] Division of Her Majesty's High Court of Justice," by writ dated, &c., "which writ is indorsed as follows . . . and you are required within [blank] days" to defend the action, and so on.

Now, in the margin of the writ in the present case, there is what may be called, perhaps, an "indorsement" of the order for leave to serve notice and the writ. This is the form in the margin:—[His Lordship read it, and continued:—]

I have asked, is there any rule or order making it necessary that that should be indorsed on the writ? The answer is, there is none. Therefore Form No. 9 clearly does not refer to an indorsement of that kind, because there is nothing within the orders that makes the indorsement necessary; neither is there anything within the Orders, so far as I know, which makes it necessary to serve notice of the order giving leave. There is nothing about it in the Orders at all.

Therefore, here is an indorsement which the Orders did not require to be put on the writ, and which, in serving the notice of the writ, has not been copied on the notice. But in the notice the essence of the indorsement on the writ is contained in distinct words. This is the notice: "And you are required within twenty-eight days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action," and so on; so that the notice served did tell the person on whom it was served the time which had been fixed by the order of the Court for him to appear and defend.

The only justification for indorsing the order giving leave on the writ is that certain rules have, for convenience, been adopted by the Judges of the Chancery Division, which rules are to be found in the Annual Practice, 1886–7 (1); and the 4th rule is this: "The Judge's leave to issue the writ shall be given by order put on the writ thus:" then it states the form of memorandum or indorsement to be put on the writ; so that it was not imperative in the present case either to give notice of the order giving leave or to copy the indorsement of the order upon the notice that was served: and I cannot find that the Defendant has been in the least degree injured or damnified, or put to any kind of inconvenience, by not having had formal notice of the order for leave, because in the notice that was served, as I have pointed out, the time limited for his appearance was distinctly stated.

Now Order LXX., rule 1, provides this: "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit." The manner in which I think fit to deal with this matter is to say that this is a crotchet which has been raised by the ingenuity of professional gentlemen in *England*, which I dare say never occurred and never would have occurred to the Defendant himself, and which has been brought into Court for the purpose of bolstering up this attempt to set aside this order. I do not yield to an attempt of this kind very readily, and in this case I refuse to do so; and the way I deal with this objection under the words "otherwise dealt with" is by refusing to give the least weight to it.

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(1) Pages 126, 127.

Then it is said that the judgment ought to be set aside:— [His Lordship then considered the objection raised by the Defendant to the judgment of the 26th of June, 1886, on the ground that it had not been served upon him, and held, upon the facts, that the objection was unfounded; that the judgment was perfectly regular, and there was no reason for setting it aside; that the Defendant was clearly bound to transfer the shares pursuant to his contract; and that he had not satisfactorily accounted for his delay in taking proceedings to set it aside.]

The motion was accordingly refused with costs.

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The Defendant appealed from this decision and the appeal was heard on the 22nd of July, 1887.

Ince, Q.C., and *S. Dickinson*, for the Appellant:—

The main point turns on Order XI., rule 1 (*e*), the question being whether this is a contract to be performed within the jurisdiction, for there is no other ground alleged for directing service abroad. Now part of the contract is to be performed at *Washington*.

[COTTON, L.J.:—No, the contract is that when certain things at *Washington* have been done you will transfer the English shares.]

This contract to transfer can be performed anywhere. The material part of a transfer is the execution of the deed—there is nothing that need be done in *England* but registration, which is not to be performed by the transferor, all that the transferor was bound to do could be done out of the jurisdiction. The registration rests with the transferee. The contract, therefore, was not one to be performed within the jurisdiction.

[BOWEN, L.J.:—Executing the deed of transfer is not enough. The transferor must deliver it to the transferee.]

If the Defendant informed the transferee that he had executed the deed, held it for him, and was ready to send it whenever he wished, he would have performed his contract. He is not bound to go to the transferee and hand the deed to him personally. Moreover, it might be delivered to him anywhere, so you cannot infer from the terms of the contract that it was to be performed within the jurisdiction. Then again the contract, to satisfy the order, must express in terms that it is to be performed within the jurisdiction, which this contract does not do. The statement that the Plaintiff has performed his part of the contract is untrue.

[COTTON, L.J.:—Can we enter into that on a question of service abroad?]

Yes, inasmuch as the rule is that on an *ex parte* application the facts must be honestly stated. The service on foreigners is a delicate jurisdiction and to be exercised with great caution: *Société Générale de Paris* v. *Dreyfus* (1). As regards delay, no doubt the order was made in April, 1886, but if the Court has no jurisdiction to order service abroad it will not assume it, and delay becomes immaterial. Again we say that the service was irregular, for according to Order II., r. 5, and Appendix A., Part I., Form No. 9, the order ought to have been copied on the notice served. A foreigner is entitled to know whether the Court has authorized the service abroad, leave to effect such service was written on the writ and is an indorsement within the meaning of the rule. The same principle applies in this case as in the case of short notice of motion by leave, the notice must state that leave has been given or the party served need not pay attention to it: *Dawson* v. *Beeson* (2).

Marten, Q.C., and *Bramwell Davis*, for the Plaintiff:—

As regards all the points but the want of jurisdiction, the Defendant is precluded by delay from raising them. He was served in April, 1886, and took no step till June, 1887, a delay of which he gives no satisfactory account. We ask by the writ for an injunction, and that brings us within sub-sect. (*f*).

[COTTON, L.J.:—If the argument of the Defendant is right that shares can be transferred anywhere that would not be an injunction to restrain the doing an act which must be done within the jurisdiction.]

(1) 29 Ch. D. 239, 242.

(2) 22 Ch. D. 504.

Lisbon-Berlyn Gold Fields Company v. *Heddle* (1) supports our case under sub-sect. (*f*.) It is little short of an absurdity to say that a transfer of shares in an English company is not an act to be performed within the jurisdiction. Then as to the contract being one which according to its terms is to be performed within the jurisdiction, those words have three possible constructions: (1) that the contract must state that it is to be performed within the jurisdiction; (2) that it must appear from the terms of the contract that it was intended to be performed there; or (3) that according to the terms of the contract as interpreted by the state of things at the time when it was entered into it appears that it was intended to be performed within the jurisdiction. We contend that a contract satisfying the last of these constructions brings the case within the rule. Here the Plaintiff was resident in *England*, and it is to be inferred that the shares were intended to be transferred to him here. The service abroad was therefore authorized by the rule, and there was no want of jurisdiction.

Ince, in reply.

COTTON, L.J.:—

I think we ought to take time to consider the principal question as to the proper interpretation and effect of Order XI., rule 1, sub-sect. (*e*), but we will now dispose of the other points in the case.

This is a motion to discharge an order giving leave to serve notice of a writ out of the jurisdiction. That order was made more than a year before this application; and by virtue of service pursuant to that order, judgment was obtained in June, 1886, on the ground that the Defendant had not delivered a defence. The Defendant who is now moving does not apply on an affidavit of merits asking for leave to defend, but seeks to have the order for service discharged on several grounds. He has raised objections to the affidavit on which the order was obtained—that there was not sufficient disclosure of the real facts of the case, and that the Court was not properly informed of matters of which it ought to have been informed. Now, I do not for a moment intimate an

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(1) 52 L. T. (N.S.) 796.

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opinion that persons applying for *ex parte* orders of this kind ought not fully and fairly to state the facts on which their application depends, but fully as I adhere to that rule, it is in my opinion too late for the Defendant, who has lain by without taking any step for more than twelve months, to ask us to interfere on the ground of those alleged irregularities, however much we might have attended to them if, immediately after the service had been made, he had applied on those grounds to discharge the order for service. Supposing, then, that he could have maintained those objections to the contents of the affidavit if he had come earlier than he has, I am of opinion that we cannot attend to them now.

An objection of another kind was relied upon a good deal by Mr. *Dickinson*. He said that no writ of this kind could be issued without an order of the Court authorizing it to be issued, and that according to the directions given by some of the equity Judges, that order ought to be written on the writ, which in this case was done, but that there was no copy of that in the notice which was served in this case, and therefore that the Defendant was perfectly justified in entirely disregarding the service. As I understand the argument it is this—that Form No. 9, which states the form in which a notice of a writ is to be served, requires that the notice shall contain a copy of all the indorsements upon the writ—that this order must be treated as an indorsement within the meaning of that form, and that as the notice served did not comply with the form the Defendant might disregard it. In support of this Mr. *Dickinson* referred to a case in which the Court held, that where a person received a notice of motion for a particular day not set apart for motions, no order could be taken against that person on an affidavit of service when the notice of motion did not state that the leave of the Court had been obtained to serve the notice for that day. That is an entirely different thing. Parties are not bound to appear on a day not set apart for motions unless the Court gives special leave to their opponent to bring them before the Court on that day. Here it is said that there is no jurisdiction in consequence of this indorsement not having been copied. In my opinion the simple answer to that is this, that this is not an indorsement within the meaning of

Form 9. Order II., rule 1, and Order III., prescribe what indorsements shall be made, and those are the indorsements referred to in the form. The forms prescribed by the Orders were therefore followed, and it would in my opinion be wrong to say that the mere omission of the indorsement of the order made by the Judge in Chambers on an application for liberty to issue this writ is such a departure from Form 9 as would justify the Defendant in disregarding the service of the notice altogether.

On the other question of jurisdiction arising on the true construction of the rule as applicable to this particular contract, I think we ought to take time to consider, as it is a matter of considerable importance and the rule is not very clear.

Bowen, L.J. :—

I agree.

July 30. Cotton, L.J. :—

This is an appeal from a refusal of Mr. Justice *Kay* to discharge an order giving leave to serve notice of the writ in the action in the *United States of America*. After the case had been heard we disposed at once of various points raised by the Appellant, because they were not matters of great general importance, but we reserved the question what was the true construction of Order XI., rule 1, sub-sect. (*e*), which enables service out of the jurisdiction in particular cases, within which this was said to come.

The contract so far as it could be performed by the Defendant was a contract to transfer certain shares in an English company to the Plaintiff. Both parties are American citizens, and neither of them is domiciled in *England*. The Defendant is resident in the *United States*, but as to the Plaintiff, though he is an American, his house of business is in *London*, and he is resident in *England* for the purposes of his business. The Plaintiff relies on sub-sect. (*e*), which provides that there may be service out of the jurisdiction when the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made "which according to the terms thereof ought to

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be performed within the jurisdiction" unless the defendant is domiciled or ordinarily resident in *Scotland* or *Ireland.*

The question we have to consider is this, what is the meaning of "which according to the terms thereof ought to be performed within the jurisdiction"? It was said by the Appellant to mean that it must be an express term of the contract that it should be performed within the *United Kingdom.* In my opinion that is not the true construction. The difficulty arises from the words "according to the terms thereof," but in my opinion those words mean, that you must look at the contract and at the facts which existed at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction, and do not mean that there must be an express provision that the contract is to be performed within the jurisdiction.

What are the facts here? At the time when the contract was made the Plaintiff was resident in *England,* the document which was relied upon as containing the terms of the contract was dated at the place of business of the Plaintiff and has his name at the top of it, that was the place where he carried on his English business and he was then resident here, and his residence, although he was not domiciled here, was not merely temporary. The contract was to transfer shares. It was said that such a contract might be performed by the Defendant's executing a deed of transfer in the *United States.* But that would not perform the contract. It would not be enough to execute in the *United States,* or out of the jurisdiction, a deed of transfer, because the transferor must deliver that deed of transfer to the transferee, that is to say, to the Plaintiff, and having regard to the fact that the contract to transfer the shares was a contract made in *England* and with the Plaintiff who was at that time carrying on business in and resident in *England,* the contract in this case ought in my opinion, according to its terms, to have been performed within the jurisdiction. In my opinion, therefore, jurisdiction was given by this rule to the learned Judge to make the order for service out of the jurisdiction. It was not contended that in this case the Defendant was not bound by the legislation which enabled this order to be made, and as that is so, in my opinion there was jurisdiction in

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the Judge to make the order if he thought fit, and I see no reason why, as he had the jurisdiction, we should interfere with the exercise of his judicial discretion in granting leave to serve notice of the writ out of the jurisdiction. The appeal, therefore, in my opinion fails.

BOWEN, L.J. :—

I am of the same opinion.

Solicitors for Plaintiff: *Slade & Munk.*
Solicitors for Defendant: *Francis & Johnson.*

H. C. J.

MINERAL WATER BOTTLE EXCHANGE AND TRADE PROTECTION SOCIETY *v.* BOOTH.

[1887 M. 1907.]

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CHITTY, J.
July 8.
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Aug. 9.

Restraint of Trade—Rule of Society not to employ Servants of other Members—Public Policy—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 23 [*Revised Ed. Statutes, vol. xvi., p.* 625].

A society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor *employé* who had left the service of another member without the consent in writing of his late employer till after the expiration of two years:—

Held, by the Court of Appeal (affirming the decision of *Chitty*, J.) that the rule was unreasonable, in restraint of trade, and void.

But, *semble*, a rule protecting the members against information gained by servants being improperly communicated to other members, if reasonably framed, would have been good.

Whether the society was to any and what extent within the *Trade Union Acts*, 1871 and 1876, *quære.*

THE *Mineral Water Bottle Exchange and Trade Protection Society, Limited*, the Plaintiffs in this action, were incorporated under the *Companies Act*, 1862, for the purpose of protecting the property and promoting the interests of the members, who were mineral water manufacturers in *London* and elsewhere. Some of the present members carried on business in *Bristol*, *Harrogate*, *Liverpool*, and *Glasgow*, and one at *Sydney*, in *New South Wales*.

By the 1st article of the articles of association it was declared

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that for the purposes of registration the society should consist of 500 members. The 44th article was as follows:—

"No member of the society shall employ any traveller, carman, or outdoor *employé*, who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service."

The Plaintiff, *J. Cox*, and the Defendants, *Booth & Co.*, were both mineral water manufacturers, and were both members of the society. *John West* had been a carman in the employment of *J. Cox* for about four years, and left that employment on the 25th of April, 1887. On the same day he applied for employment to the Defendants, who wrote to *Cox* inquiring his character. *Cox* alleged nothing against his character, but protested against his being employed by the Defendants in consequence of article 44. The Defendants, however, engaged *West*, and *Cox* and the society joined as co-Plaintiffs in the present action, in which they claimed an injunction restraining the Defendants from employing *West* in their business.

The Defendants put in a defence pleading that the society was a trade union under the *Trade Union Acts* (1), and that the

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(1) The *Trade Union Act*, 1871 (34 & 35 Vict. c. 31), which legalized and provided for the registration of trade unions, contained in sect. 23 the following definition of a trade union:—

"The term 'trade union' means such combination, whether temporary or permanent, for regulating the relation between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." The section contained certain exceptions from the operation of the Act, which are not material.

By sect. 4 it is enacted as follows: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely (among others): Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed."

By sect. 5 it is enacted that "the *Companies Acts*, 1862 and 1867, shall not apply to any trade union, and the registration of any trade union under any of the said Acts shall be void."

The *Trade Union Act*, 1876 (39 & 40 Vict. c. 22), sect. 16, substitutes for the former definition, the following:— "The term 'trade union' means any

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registration of the society under the *Companies Act*, 1862, was void. They also pleaded that the article 44 was unreasonable and void as being in restraint of trade.

The Plaintiffs moved for an injunction before Mr. Justice *Chitty* on the 8th of July, 1887.

Bradford, for the Plaintiffs.

Hall, for the Defendants.

CHITTY, J.:—

This is a motion made by the *Mineral Water Bottle Exchange and Trade Protection Society, Limited*, and Mr. *Cox*, who is a member of that society, and the object of the motion is to enforce by injunction the 44th article of the articles of association. That article runs thus, "No member shall employ any traveller, carman, or outdoor *employé*, who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service." The first of the articles declares the society for the purpose of registration to consist of 500 members, and it appears sufficiently that the members are persons carrying on the mineral water trade. At the present moment there are 179 members who carry on business at various parts of *England* and *Scotland*, and indeed of the world, for amongst other members there are Messrs. *Schweppe*, who have a place of business in *New South Wales*. The limit of 500 has not been reached, but there is nothing to prevent the society embracing that number of members, and the result would be this, that the numbers would cover, and do cover at the present moment, practically a large portion of *England* itself, portions of *Scotland*, and a portion also of the Colonies.

Now it appears to me that with reference at least to this 44th

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combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

article (and I have not to go beyond that on this motion) this is a trade union. The *Trade Union Act* of 1871 contained a definition of "trade union," with a proviso which excepted, as one might have expected there would be excepted, agreements of a particular kind, agreements between partners as to their own business, agreements between employers and those employed by them as to such employment, and agreements in consideration of the sale of the goodwill of a business, or the instruction in any profession, trade, or handicraft. Then the definition contained in that Act was varied by the 16th section of the Act of 1876, which, however, retained the proviso that I have just read, and under this definition the term "trade union" means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business whether such combination would or would not, if the principal Act had not been passed, have been deemed to be or have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade. The 4th section of the *Trade Union Act* of 1871 enacts that "nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements," and amongst those are agreements between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall (I leave out the immaterial words) transact business, employ, or be employed.

It appears to me that this 44th article is in any view of the case an unreasonable restraint of trade. It is contained in the articles of association of this company, and it is not an agreement between the employer and the employed, but it is an agreement between employers of labour, who may amount, as I have already said, to the large number of 500, and the agreement relates to carmen amongst others. The person whose employment has given rise to this question is a carman. According to the evidence on one side a man can almost at once discharge the duties of a carman, as little skill is required beyond competency to drive horses and some honesty. According to the other side a somewhat high degree of skill is required, but it is not a high degree. It is for instance in this part of the kingdom a knowledge of the streets of *London* and of the locality about *London*. The article is in no sense framed with reference to soliciting orders or the like, but it is a harshly conceived absolute agreement that no member, that is to say, no one of those 179 members at the present moment, shall employ any carman who has left the service of another member without the consent in writing of his late employer, without any limitation of space except that limitation which, as I have pointed out in the early part of this judgment, exists by reason of the nature of the association. As the members may be in any part of the world so the area to which this agreement would apply would be co-extensive, the only limitation being a limitation of two years in point of time. There may be the most honest and respectable carman that can be conceived. If he has the misfortune to discharge himself lawfully he falls within this rule, not as being himself bound, but, according to the contention put forward, the members of the association, these 179 persons at the present moment, must all close their doors to him and refuse to employ him. I think this is an unreasonable restraint of trade, and there is no business here of a society to be protected. The business that is intended to be protected, as I understand the argument of the Plaintiffs, is the business of each individual member, but the agreement is not the agreement of Mr. *A.* and Mr. *B.*, mere members of the society, it is the agreement of all the members with the society itself. I think that this is an unreasonable restraint. It is quite enough for me to dispose of this motion on that ground, and I think it is an agreement which I ought not to enforce as between the society and any member, or as between any members of the society itself.

The result therefore is I refuse the motion.

C. A.

From this judgment the Plaintiffs appealed. The appeal was heard on the 9th of August, 1887.

Romer, Q.C., and *Bradford*, for the Appellants:—

The main question in this case is whether this covenant is an unreasonable one or against public policy. We admit that if it had been unlimited it would have been void. But it is not unlimited. It only applies to servants of members, and is for the mutual protection of the members. It is in evidence that the nature of the business is such that discharged travellers and carmen can do a great deal of injury to their late masters by soliciting their customers on behalf of their new employers, and before the society was established several members had private agreements to the same effect as the rule. The covenant does not therefore go beyond what is reasonable for the mutual protection of the members. Nor is there anything really oppressive in the rule. For the discharged servants are only prevented from getting similar employment within a limited area and can obtain it anywhere else in *England*: *Collins* v. *Locke* (1); *Jones* v. *North* (2).

There is no reported case exactly in point, but there being nothing unreasonable or against public policy in it the Court is bound to enforce it.

[BOWEN, L.J., referred to *Hilton* v. *Eckersley* (3).]

Whitehorne, Q.C., and *Hall*, for the Defendants, were not called on.

COTTON, L.J. :—

We are asked here on appeal from Mr. Justice *Chitty* to enforce a covenant contained in the articles of association of this company. Now I do not enter at all into the question how this company is to be regarded. In my opinion the question here is simply this: can we enforce the 44th article, treating it (as it is) as a covenant between all the members? I think we cannot.

We have not to deal with the question here as to whether the members of this body might have enforced a covenant exclusively pointed to preventing the members from injuring one another in a particular way by improperly acquiring information which had been gained by the servants of one another. That matter is not before us. Therefore I think it better not to give

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(1) 4 App. Cas. 674.
(2) Law Rep. 19 Eq. 426.
(3) 6 E. & B. 47.

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any opinion as to how any such covenant or restriction might have been framed so as to be lawful. What we have to deal with here is not such a covenant. I only mention it so that it may not be supposed that we give any opinion as to any covenant properly framed to prevent one member from injuring another by acquiring information from a servant. The 44th article of the association provides that "No member shall employ any traveller, carman, or outdoor *employé* who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service." That is perfectly general. It is not even limited in its application to any particular *employés* who, from their position, might have confidentially acquired any knowledge in their employment. It is not confined to servants who, having been put in places of confidence, have been long enough in the service to obtain any information which they ought not to disclose, and which might be used to the detriment of their employer. So that generally if any outdoor *employé* were in the service of any member of this society even for a week and then left he could not be employed, if this covenant is a good one, by any other member of the association. That of itself might be used most oppressively, and although in the present case (we have not heard the circumstances) it might be proper, if the covenant were aptly framed, to restrain the Defendants from employing a particular individual so as to prejudice his late employer by using knowledge he had got confidentially, yet there is no restriction or limitation in this covenant at all. It is very like the case which Lord Justice *Bowen* referred to of *Hilton* v. *Eckersley* (1), in which there was an attempt to regulate the way in which certain members of the association were to carry on their trade. That is a difficulty here. But in my opinion the great objection to this covenant is that it might be used most oppressively by preventing a man who had never been in any confidential position and never desired improperly to use the information he had then acquired from getting employment from another master in the trade which he knew most about, and which he could best carry on. In my opinion, on the ground that this covenant is one which we ought not to enforce, this motion ought to be refused.

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(1) 6 E. & B. 47.

BOWEN, L.J.:—

I agree so entirely with the judgment of the Lord Justice that I will not add anything.

FRY, L.J.:—

I am entirely of the same opinion. It appears to me that a covenant might have been framed which possibly might have been good, that is to say, that the masters might have contracted not to use in competition with one another knowledge confidentially obtained. It is said the object of this clause is to give effect to that intention. But it has gone far beyond it because it applies to every traveller, every carman, and every outdoor *employé,* whether they have or have not acquired such knowledge. It applies to those who may have acquired knowledge although they may have been employed in distant localities where their knowledge is of no avail. I think therefore the restraint of trade and of the liberty of Her Majesty's subjects in gaining employment is far in excess of any legitimate purpose of the contracting parties.

Solicitors: *W. Webb*; *Smythe & Brettell.*

M. W.

In re PRATER.
DESINGE *v.* BEARE.

[1886 P. 876.]

CHITTY, J.
1887
July 21.

Will—Construction—Property at my Bank—Share Certificates.

Bequest of "my property at *R.'s* bank." At his death the testator had at *R.'s* bank a cash balance, also certificates of shares, some inscribed in his name and others payable to bearer:—

Held, that the cash balance only passed under the gift of "my property at *R.'s* bank."

ADJOURNED SUMMONS.

Dr. *Horatio Prater*, who died in 1885, by his will dated 1875, after a legacy of £4500 to his sister, whom he also made his residuary legatee, of £4000 to his sister-in-law, and various pecuniary legacies, including a legacy of £2000 to his housekeeper and a legacy of £2000 to the *English Society for Prevention of Cruelty to Animals*, made the following gift:—

"I give to the *Société Protectrice des Animaux* of *Paris* the sum of £500, also half my property at *Rothschild's* bank, *Rue Lafitte, Paris;* the remaining half of my property I give to be divided equally between the following two public libraries in *Paris*, viz., the *Mazarin* and the public library in the *Rue Richelieu.*"

The testator had an English domicil, but was in the habit of passing some months from time to time in *Paris.* He had a banking account in *London*, and also, for his convenience when in *Paris*, an account at the bank of Messrs. *Rothschild, Rue Lafitte, Paris.* At the time of his death a balance of about 8000 fr. (£320) was standing to his account at *Rothschild's*, and he had also deposited for safe custody at their bank *actions au porteur* (share certificates, payable to bearer), and *actions nominatives* (shares inscribed in his name) in the *Paris, Lyon, and Mediterranée Railway Company* of the value of about £7000.

The *actions nominatives* shew on their face the name of the owner, and pass by a course of proceeding equivalent to transfer and registration, but payment of the *rentes* or dividends can be obtained by the bearer, without being the person named in the instrument itself.

It appeared that Messrs. *Rothschild* were empowered to receive the *rentes* or dividends of both classes of *actions*, which they did from time to time, passing the amount when received to the testator's account.

The total value of the personal estate, including the *actions*, was under £20,000, so, that if the *actions* passed under the bequest of "my property at *Rothschild's* bank," the estate would be insufficient for payment of the other legacies.

This summons was taken out for the purpose of having it declared that the shares in the *Paris, Lyon, and Mediterranée Railway Company* in the name of the testator, and the shares *au porteur* in the same undertaking, were included in the bequest of his property at *Rothschild's* bank contained in his will in favour of the *Société Protectrice* and the two public libraries.

Sir *A. Watson*, Q.C., and *Wiglesworth* (for *R. F. Norton*), in support of the summons:—

We submit that the words "all my property" are a large term, and must have full effect given to them—and that not only the cash balance but the *actions* deposited by the testator at the bank will pass under this bequest. A *chose in action* has no locality: *Moore* v. *Moore* (1); *Fleming* v. *Brook* (2). Debts due to a testator domiciled in *India* from persons in *England* will pass under the words "property in *England*:" *Arnold* v. *Arnold* (3); so also debts due for rent or otherwise from persons in *Northumberland*, or in the island of *Mauritius*, are property in *Northumberland* or the *Mauritius: Earl of Tyrone* v. *Marquis of Waterford* (4); *Guthrie* v. *Walrond* (5).

[They also referred to *Brooke* v. *Turner* (6) and *Marquis of Hertford* v. *Lord Lowther* (7).]

Romer, Q.C., and *Ingle Joyce*, for the executors, did not dispute

(1) 1 Bro. C. C. 127.
(2) 1 Roper, Leg. 4th Ed. 258.
(3) 2 My. & K. 365.
(4) 1 D. F. & J. 613.
(5) 22 Ch. D. 573.
(6) 7 Sim. 671.
(7) 7 Beav. 1.

that the cash balance at *Rothschild's* would pass, and were not called on as to the *actions.*

CHITTY, J. (after stating the facts, continued):—

The question is what passes under the words "my property at *Rothschild's* bank." This, as is evident from the reading of the will, is something given in addition to the £500; and at first sight it would seem odd that he should annex to the £500 a gift of one half of £7000, which is equivalent to £3500. That is a slight circumstance in my opinion. He had at *Rothschild's* at the time of his death a balance of between £300 and £400, and that was about his usual balance, which varied, as I understand, from not less than £300 to not exceeding £600. Did that balance pass? Counsel have not argued, and I think rightly, in opposition to the claim of this French *Société*, that it did not.

The gift is of property at *Rothschild's* bank. Something must have been intended to pass under that. Now in strict law this balance was a debt due from the bank, but, to adopt part of the phraseology of Sir *A. Watson* in his argument, that is not the popular view, and, when I say that, I am not speaking of the popular view in any lower sense, but I am speaking of it in the ordinary sense in which the term is used among public men. In will after will is to be seen a gift of "my money at my bankers." It is a perfectly intelligible phrase, about which there can be no doubt, and it is quite usual for business men to talk of so much money or so much cash at their bankers. And, seeing that I must give some meaning to these words, it appears to me to be quite right on the part of the Applicants to say that it includes his balance, because that is property, viz., money; though in law a debt—property of his at his bankers.

That being so, is there on the facts before me anything else included. It was rightly argued that "property" is a large term. I am not at liberty, nor am I disposed, to cut it down, but it is property described with reference to a bank, at a bank. It is not property described with reference to a country or to a large district, to a county like *Northumberland*, or to an island like *Mauritius*; but it is property described with reference to a limited locality, viz., at a bank. I think that the observations

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of Lord *Eldon* in *Stuart* v. *Marquis of Bute* (1) put the matter in the tersest way. He was commenting upon Lord *Hardwicke's* decision in the *Countess of Aylesbury's Case* (2) that bank notes passed under words something of the same kind as here, and says (3): "It was a bequest of 'my house and all that shall be in it at my death.' Lord *Hardwicke* held, that cash passed; and bank notes; which Lord *Hardwicke* there, I do not know why, considered as cash; but not promissory notes and securities; as they were the evidence of title to things out of the house, and not things in it. Bank notes I think just in the same situation."

These *actions* were evidence of the testator's title to property not at *Rothschild's*, but to property in the *Paris, Lyon, and Mediterranée Railway Company*. I have read that passage not for the purpose of citing Lord *Eldon's* observations with regard to bank notes, but because I think it expressly in point. If this case were to be decided upon authority there are two cases which are authorities upon the general principle, and not on the mere special language of any particular will. These are *Brooke* v. *Turner* (4) and the well-known decision of Lord *Langdale*, M.R., in *Marquis of Hertford* v. *Lord Lowther* (5). I think it unnecessary to go through these or any other cases; they have been so often reviewed. In my judgment, giving the fair meaning to the word "property," taking it in connection with this limiting and restricting context, I think that none of the *actions* ought to pass. No distinction can be made between the two classes of *actions*, viz., those to bearer and those which are, according to the French term, *nominatives*. If I were allowed to conjecture, as some Judges have done, my conjecture would be that I am fulfilling the intention of the testator in not depriving his sister of so large a sum, and that he did not intend, as against her, to dispose of so large a sum as £7000.

Solicitors: *T. Parker Dixon; Wilkinson & Howlett.*

(1) 11 Ves. 657.
(2) 1 Ves. Sen. 273.
(3) 11 Ves. 662.
(4) 7 Sim. 671.
(5) 7 Beav. 1.

F. G. A. W.

In re NEWBEGIN'S ESTATE.
EGGLETON *v.* NEWBEGIN.

CHITTY, J.
1887
July 27.

[1886 N. 368.]

Pauper Lunatic—Guardians of the Poor—Past Maintenance—Statute of Limitations (21 *Jac.* 1, *c.* 16) [*Revised Ed. Statutes, vol. i., p.* 705]—*Lunatic Asylums Act,* 1853 (16 *&* 17 *Vict. c.* 97), *s.* 104 [*Revised Ed. Statutes, vol. xi. p.* 809].

Under sect. 104 of the *Lunatic Asylums Act*, 1853, the guardians of the poor of a parish to which a pauper lunatic is chargeable are entitled in the event of his becoming entitled to property to recover only six years' arrears in respect of the sums paid by them for his maintenance in an asylum.

ADJOURNED SUMMONS.

Yeoman Newbegin, by his will, dated the 7th of October, 1858, after bequeathing certain legacies, gave and bequeathed all the rest and residue of his property to be equally divided amongst his three children, namely *Thomas Yeoman Newbegin*, *Eliza Ann*, and *William John Newbegin*, when they attained twenty-one, and appointed *Thomas Newbegin* and the Plaintiff, *William Henry Eggleton*, executors.

By a codicil dated the 23rd of July, 1872, the testator bequeathed to his eldest son, *Thomas Yeoman Newbegin*, the sum of £25 per annum during his natural life, to be paid out of his estate.

The testator died in November, 1880, and his will and codicil were proved in December, 1880.

At the death of the testator, *Thomas Yeoman Newbegin* the testator's eldest son, was and had been since the year 1867 confined as a pauper lunatic in the *Sussex County Lunatic Asylum*, situate at *Hayward's Heath*, and had been maintained at the cost of the guardians of the poor of the parish of *Brighton*.

An originating summons was commenced by the Plaintiff, as surviving executor of the testator, in April 1886, for liberty, amongst other things, to pay into Court a sufficient sum to answer the annuity bequeathed to the Defendant *Thomas Yeoman*

Newbegin, and the arrears of the annuity, and the one-third part of the testator's residuary estate bequeathed to him.

Notice of the summons was served on the superintendent of the asylum on the 9th of November, 1886, which notice, as appeared from the evidence, was the first intimation the guardians received that the lunatic had become entitled to property.

The guardians carried in a claim for past maintenance of the lunatic, and the summons came before the Judge in Chambers on the 9th of December, 1886, when he directed payment of the amount claimed by the guardians out of the lunatic's share, subject to a proper account being furnished.

An account duly verified, extending over the whole period of the lunatic's confinement in the asylum, having been carried in, an objection was raised on the part of the Plaintiff that the claim for maintenance must be limited to six years' arrears, and the summons was adjourned to the Judge, and now came on to be heard in Court, and the only question was whether the claim of the guardians was to be limited to six years' arrears, and turned upon the interpretation of the 104th section of the *Lunatic Asylums Act*, 1853 (16 & 17 Vict. c. 97) (1).

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(1) 16 & 17 Vict. c. 97, s. 104: "If it appear to any justice or justices by this Act authorized to make any order for the payment of money for the maintenance of any lunatic that such lunatic has an estate, real or personal, applicable to his maintenance, and more than sufficient to maintain his family, if any, he or they shall, by an order under his or their hand and seal or hands and seals, direct the overseers of the parish, or a relieving officer of the parish or union, or the treasurer or some other officer of the county to which such lunatic is chargeable, or in which any property of the lunatic may be, or an officer of the asylum in which the lunatic may be, to seize so much of any money, and to seize and sell so much of the goods and chattels, and to take and receive as much of the rents and profits of the lands and tenements of such lunatic and other income of such lunatic, as may be necessary to pay the charges of the examination, bringing before a justice or justices, removal, lodging, maintenance, clothing, medicine, and care of such lunatic, accounting for the same to such justice or justices, such charges having been first proved to the satisfaction of such justice or justices, and the amount set forth in such order; and if any trustee or other person having the possession, custody, or charge of any property of such lunatic, or if the *Governor and Company of the Bank of England*, or any other body or person having in their or his hands any stock, interest, dividend, or annuity belonging or due to such lunatic, pay any money according to any such order, or pay any money without any such order, to the guardians of any

Whitehorne, Q.C., and *R. F. Norton*, for the Guardians :—

If this is a debt then we admit the *Statute of Limitations* applies, and that we are only entitled to six years' arrears.

We submit that the 104th section of the *Lunatic Asylums Act* is express on the point. That is the only authority under which repayment can be made to the guardians. That section enacts that the justices shall by an order direct the overseers and other persons mentioned to seize so much of the goods and chattels, &c., of the lunatic as may be necessary to pay the charges of the examination, bringing before the justices, removal, lodging, maintenance, &c., of the lunatic, and then it further enacts that if any trustee, &c., pay any money according to such order or without such order, to the guardians, &c., the receipt of the person authorized to receive the same shall be a good discharge.

There is no limit in this section as to time. In sects. 97 and 98 of the Act, which have reference to payments by one parish to another, a limit of time is named.

We submit that we are entitled to the full amount claimed without restriction of time.

[They referred to *In re Upfull's Trust* (1); *Re Drewery's Trust* (2); *Re Buckley's Trust* (3).

Chitty, J. referred to *Wentworth* v. *Tubb* (4)].

Upjohn, for the Plaintiff and the other parties to the action, including the guardian *ad litem* of the lunatic :—

The section is simply permissive and enables the custodians of the lunatic to pay a lawful debt. The Court exercising the powers of the statute will consider what is best for the lunatic.

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union or parish, or to any overseer of any parish not in a union or under a board of guardians, or to the treasurer of any county, or any other officer of any county authorized to receive the same, to defray the charges paid or incurred by or on behalf of such parish, union, or county, for the examination, bringing before a justice or justices, removal, lodging, maintenance, clothing, medicine, and care of such lunatic, the receipt of the person authorized to receive such money under such order, or of such guardians, overseer, or treasurer, or other officer, shall be a good discharge to such trustee, governor, and company, or other body or person as aforesaid."

(1) 3 Mac. & G. 281.

(2) 2 W. R. 436.

(3) Joh. 700.

(4) 1 Y. & C. (Ch.) 171.

It is clear from a perusal of the judgment in *Re Buckley's Trust* (1) that *Wood*, V.-C., considered there was a debt for which the lunatic might be sued. That case, therefore, is in favour of my contention that the guardians are only entitled to six years' arrears.

[He referred to *In re Marman's Trust* (2); *In re Weaver* (3); *In re Webster* (4).]

Whitehorne, in reply.

CHITTY, J.:—

This is a case of some difficulty. The point is this. An executor has funds in his hands which belong to a person who is a lunatic and who has been in the county asylum for a considerable number of years on the footing of being a pauper, and under his father's will he has lately had an accession of property. The executor desires the direction of the Court with regard to the application of the funds he has in his hands belonging to the lunatic. The lunatic has no family, and he is still in the asylum, and the question for decision relates to past maintenance.

The guardians of the parish chargeable say that for more than six years they have been applying moneys in their hands for the purposes mentioned in the 104th section of 16 & 17 Vict. c. 97, and that they are now entitled to have repaid to them out of the lunatic's fund the whole of the amount without regard to the *Statute of Limitations.*

The question is whether the statute does or does not apply to this. The exact part of the section on which the question turns runs thus: "If any trustee or other person having the possession, custody, or charge of any property of such lunatic, or if the *Governor and Company of the Bank of England,* or any other body or person having in their or his hands any stock, interest, dividend, or annuity belonging or due to such lunatic, pay any money according to any such order" (I will state what that is in a minute), "or pay any money without any such order, to the guardians of any union or parish, or to any overseer of any parish

(1) Joh. 700.
(2) 8 Ch. D. 256.
(3) 21 Ch. D. 615.
(4) 27 Ch. D. 710.

not in a union or under a board of guardians, or to the treasurer of any county, or any other officer of any county authorized to receive the same, to defray the charges paid or incurred by or on behalf of such parish, union, or county for the examination, bringing before a justice or justices, removal, lodging, maintenance, clothing, medicine, and care of such lunatic, the receipt of the person authorized to receive such money under such order, or of such guardians, overseer, or treasurer, or other officer, shall be a good discharge to such trustee, governor, and company, or other body or person as aforesaid." That is in its form a mere permissive enactment. The trustee, and not only the trustee, but other persons who for the purposes of this enactment the Legislature considered to be in an analogous position, are allowed to make the payment; and if they do make the payment then the receipt of the guardians and the other persons here mentioned is a good discharge. But this part of the section cannot be interpreted properly without reading the earlier part, and a question which has been argued before me is with regard to the effect of the previous part of this same section—is this previous part founded on an obligation on the part of the lunatic to make the payments mentioned, or is it the creation of a new statutory liability—is it the recognition of an old or the creation of a new? Now I must read the earlier part: "If it appear to any justice or justices by this Act authorized to make any order for the payment of money for the maintenance of any lunatic that such lunatic has an estate, real or personal, applicable to his maintenance, and more than sufficient to maintain his family, if any, he or they shall, by an order under his or their hand and seal or hands and seals, direct the overseers of the parish, or a relieving officer of the parish or union, or the treasurer or some other officer of the county to which such lunatic is chargeable, or in which any property of the lunatic may be, or an officer of the asylum in which the lunatic may be, to seize so much of any money, and to seize and sell so much of the goods and chattels, and to take and receive so much of the rents and profits of the lands and tenements of such lunatic and other income of such lunatic, as may be necessary to pay the charges of the examination, bringing before a justice or justices, removal, lodging, main-

CHITTY, J.
1887
In re NEWBEGIN'S ESTATE.
EGGLETON *v.* NEWBEGIN.

tenance, clothing, medicine, and care of such lunatic, accounting for the same to such justice or justices, such charges having been first proved to the satisfaction of such justice or justices, and the amount set forth in such order." It is a power to seize and to seize property to the amount required for the payment of the sum mentioned in the order. Land or real estate is mentioned, but there is no charge upon the *corpus* of the land; and it appears to me that all that the justices can direct to be seized under this is the property of the lunatic real and personal to which the lunatic is entitled, not through the medium of any trust, and I think that this part of the section must be read as certainly creating a new remedy.

But was it intended merely to recognise an old pre-existing liability or not? That is a question of some little difficulty. I think, consistently with the decisions that have been pronounced upon this section or a section in the repealed Act (7 & 8 Vict. c. 101, s. 27), which for all practical purposes is equivalent to this, I am bound to hold that this statute recognizes a liability on the part of the lunatic to pay for the matters which are here mentioned, which are in the nature of necessaries for the lunatic. In *Re Buckley's Trust* (1) Vice-Chancellor *Wood* said that his impression was that he had often acted on the authority of *In re Upfull's Trust* (2), which was Lord *Truro's* decision, and continued: "There may be some doubt whether the justices could make an order actually to seize the stock, or whether the overseers could get anything more than the income of the stock under such an order. But I think that the Court will be acting for the benefit of the lunatic in paying the debts for which he is liable, and saving him from process under which he might be incarcerated." In that part of his judgment he plainly considers that an action might be brought, either on the footing that these were necessaries supplied for the benefit of the lunatic, or that the statute created an obligation to pay. The latter may be, after all, the true view. So that it either stands as a recognition of the pre-existing liability or the creation of a new liability by statute. But it is a liability, according to this judgment, on which an action might be brought. The decision which I am reading was in 1860, when a man might be thrown into prison for debt; and the grounds on which the Vice-Chancellor proceeds are that being placed in the position of a trustee, the Court ought to do that which would save the lunatic from being incarcerated for a debt for which he is liable. I have slightly transposed his words, but I have not altered the sense in the least. Then he goes on: "In order, therefore, to relieve the lunatic from the possibility of an execution against him, the Court will apply the *corpus* of his property in satisfaction of the claim of the petitioners. I apprehend that the Court has a discretion at any time to say whether it will exercise this power of dealing with a lunatic's property, or whether it will leave the claimants to their remedy by execution. In cases where the application was to take away the whole of the lunatic's property, the Court might prefer to leave the creditors of the lunatic to do their worst; but this is not such a case, and there will be an order as prayed." Throughout the judgment the Vice-Chancellor relies on the fact that there is a debt for which the lunatic might be sued, and then his reasoning is this: "I am now acting in the place of the trustee, and in executing this trust will do that which I think the trustee ought to do." There is no jurisdiction by this section conferred on the old Court of Chancery which then existed, or on the High Court as it now exists. All that is done is to authorize the trustee to make the payment, and then, says the Vice-Chancellor, "I will make the payment executing the trust, because I consider it for the benefit of the lunatic so to do in order to save him from the process of execution and the other liabilities to which a debtor is liable." Now I am not at liberty to overrule what the Vice-Chancellor did in the year 1860; and if he has taken a wrong view of the Act of Parliament, it is not for me to say so. I find that Vice-Chancellor *Bacon* has held in *In re Webster* (1), that the guardians who had not obtained any order under the first part of the section are creditors of a deceased lunatic, and entitled to be paid. In my opinion, if I may express it, that is right; the debt arising either by virtue of a pre-existing liability recognised by the statute or by virtue of a new obligation created by the statute.

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(1) Joh. 700.

(2) 3 Mac. & G. 281.

(1) 27 Ch. D. 710.

Now I come to the exact point. If this is a debt apart from the statute then it follows as a matter of course that the lunatic, appearing as he does now by his guardian *ad litem*, is entitled to set up the *Statute of Limitations*, and there is no pretence, as was partly suggested in argument, for saying that this Court is to administer the lunatic's estate in some such way as to pay all the debts without regard to the question of the *Statute of Limitations.* The lunatic is entitled now to defend himself in this proceeding as if it was an action brought against him. I stated the exact form at the beginning of this judgment in which the question arises, but it is substantially this, that the guardians are suing the lunatic. Having made that statement I say it is obvious that the lunatic can set up the *Statute of Limitations*, if the claim against him proceeds on the footing of the section being a recognition of the debt. But if it is a statutory liability created, the statute only creates the liability, and is silent with regard to the point of time. It does not say that this debt or obligation shall be paid at whatever time it accrued or notwithstanding the general law as to the statute. It appears to me to leave the *Statute of Limitations* applicable to the case where it would apply. As I have pointed out at the beginning of this judgment, it does not make it in terms obligatory or in substance obligatory on the trustees to pay. It is merely permissive. I think if it is a statutory obligation the lunatic is entitled to set up the statute. It appears to me that this case is analogous to the case of necessaries supplied to a lunatic, though in *In re Weaver* (1) some doubt is cast by the Court of Appeal as to the liability of a lunatic with regard to necessaries supplied to him, and I do not see any substantial distinction for this purpose between the case of an infant and the case of a lunatic so far as the *Statute of Limitations* is concerned.

So much for the section itself. The section is silent with regard to the *Statute of Limitations*, and it is competent for the lunatic to set it up. That is the conclusion I arrive at on the section having regard to the authorities.

But there would be a most extraordinary anomaly if it were otherwise. I admit it is competent for parliament to create any

(1) 21 Ch. D. 615.

number of anomalies if Parliament in its wisdom thinks fit, and it may consider in its superior wisdom that they are not anomalies. But this would be the result, that if there is what is called a pauper lunatic he shall remain liable, notwithstanding the *Statute of Limitations*, for any number of years for that which has been spent on him, say ten or twenty years; but if he is an ordinary pauper, that is to say, a pauper who is not lunatic, and he has been in the workhouse say for a period of ten years, and then suddenly, as sometimes happens, a large fortune accrues to him, possibly by the death of some unknown relation, he shall be liable to pay for his maintenance for one year and one year only. That is the plain effect of the 12 & 13 Vict. c. 103, s. 16, where there is a limitation of one year. In the main Act I have been construing there are two other clauses in which there is a limitation of time imposed, and that is where there is one parish, to put it shortly, which has paid for the maintenance of the lunatic, and another parish in the result is found to be the parish that ought to have paid. In that case there is a limitation of a year; and there is another similar limitation. Thereupon it is argued, by Mr *Whitehorne* that when the statute intended to impose a limitation of time it said so. But to my mind that argument is not sound as applied to this statute, because it limits a shorter time than the time allowed by the general *Statute of Limitations;* and if I had to decide on the sections that I have just been referring to, namely, the 97th and the 98th, if it had not been for the twelve months' limit I think I must have held that it was a six years' limitation. Therefore, so far from that being an argument against the conclusion I have arrived at, I think in some slight degree it supports it. The question I agree is one of difficulty, involving the construction mainly of this section of the Act of Parliament. It is impossible, as I have often heard the late Master of the Rolls say, to dogmatise on such a matter; but I have given the best opinion I can, and I think the guardians are not entitled to recover more than six years' arrears.

Solicitors: *Clarke & Calkin*, agents for *Clarke & Howlett, Brighton; Digby & Liddle.*

G. M.

CHITTY, J.
1887
Aug. 3.

In re GIBBONS' WILL.

Administration—Costs—Ascertaining Class—Trustee Relief Act.

Executors by payment into Court under the *Trustee Relief Act* of a sum to answer a legacy to a class, cannot thereby relieve the general residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled under the bequest.

PETITION.

Robert Gibbons, who died on the 1st of June, 1886, by will dated the 9th of August, 1881, bequeathed the sum of £10,000 to the children living at his death of nine persons named, in such manner that all such children should take in equal shares.

The executors had set apart out of the assets the sum of £9500 (being the amount of the £10,000 less legacy duty) on a deposit account in the *Union Bank*, and in December, 1886, they had paid the fund into Court under the *Trustee Relief Act*, stating in their affidavit that they were absolute strangers to the objects of the gift and their parents, and that being unable to ascertain with certainty who composed the class of objects they were unable with safety to distribute the fund out of Court. In the affidavit they gave the names of thirty persons who, according to their information, were believed to be the persons interested in or entitled to the fund.

In January, 1887, a petition was presented by twenty-nine out of the persons named in the executors' affidavit for an inquiry as to the children of each of the nine persons named who were living at the death of the testator; a division amongst the persons who upon the inquiry should be found entitled, and payment of the costs out of the testator's general estate.

On the 15th of January, 1887, an inquiry was directed and the rest of the petition was ordered to stand over.

It having been certified that the thirty persons mentioned in the affidavit were the persons entitled, the petition now came on for further hearing.

The only question was as to the costs of the petition.

Romer, Q.C., and *Stokes*, for the Petitioners:—

The costs of this application must be paid out of the general residuary estate in the hands of the executors, who cannot by paying the legacy into Court under the *Trustee Act* deprive the persons entitled of those costs and expenses which are properly payable out of the general assets of the testator: *In re Trick's Trusts* (1); *In re Birkett* (2); *In re Sharpe's Trustees* (3).

Whitehorne, Q.C., and *C. Parke*, for the Executors:—

All that the executors had to do was to raise the amount of the legacy, and the parties entitled must at their own expense establish their right to the fund in question. When, as here, the legacy has become severed from the bulk of the estate, the particular fund, and not the general personal estate, must bear the costs of any proceedings relating thereto: *Boycott* v. *Newman* (4); *Attorney-General* v. *Lawes* (5); *Martineau* v. *Rogers* (6); *Jenour* v. *Jenour* (7); *Morgan* and *Wurtzburg* on Costs (8). *In re Birkett* is distinguishable, as there a difficult question of law arose on the will, and the costs of ascertaining the construction were rightly given out of the general estate. *Dugdale* v. *Dugdale* (9), though *primâ facie* against our contention, is also explained by the fact that there the question who were entitled unavoidably arose under the will.

Methold, for another of the persons entitled, who had presented a petition but not proceeded with it on hearing that the present petition had been presented.

Romer, in reply:—

No case is to be found in which an executor who has neglected the duty thrown upon him of ascertaining who are the legatees has been allowed to throw the costs upon the particular legacy: *Tyson* v. *Jackson* (10).

(1) Law Rep. 5 Ch. 170.
(2) 9 Ch. D. 576.
(3) 15 Sim. 470.
(4) 4 W. R. 707.
(5) 8 Hare, 32, 43.
(6) 8 D. M. & G. 328, 335.
(7) 10 Ves. 562.
(8) Page 186.
(9) 12 Beav. 247.
(10) 30 Beav. 384.

CHITTY, J.:—

In this case the executors were bound to pay the legatees described by the testator. No trust whatever was created by the words of the will: it is a simple money legacy. Within six months after the testator's death the executors, in order to avoid the trouble of ascertaining the legatees, paid the money into Court under the *Trustee Relief Act.* An inquiry was directed, but if the executors, who were not trustees, had taken the trouble which they ought to have taken it would not have been necessary to direct an inquiry. It was part of their duty as executors to ascertain who the legatees are; this is part of the ordinary course of administration, the costs of which are payable out of residue. I can see no distinction in principle between the costs of ascertaining the construction of the testator's will, and the costs of ascertaining the members of a class of legatees. The preponderance of authority, taking *In re Trick's Trusts* (1) and *In re Birkett* (2) as two of the latest instances, is in favour of the proposition, which I think is the right one, viz., that the executors cannot by payment into Court, or any other severance of a legacy, relieve the residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled to take. The result therefore is, that the costs must come out of the residuary estate in the executors' hands.

Solicitors: *Bowlings, Foyer, & Hordern, for Moss & Sharp, Chester; Chester & Co., for Kent, McKenna & Kent, Liverpool; C. D. Woolley.*

(1) Law Rep. 5 Ch. 170.

(2) 9 Ch. D. 576.

F. G. A. W.

REPUBLIC OF PERU *v.* PERUVIAN GUANO COMPANY.

CHITTY, J.
1887
Aug. 2, 3, 10.

[1886. P. 2318.]

Practice—Striking out Pleading—Rules of Supreme Court, 1883, *Ord. xxv. r.* 4 *—Dismissal of Action—Sovereign Power—Acts of de facto Government—Attempted Repudiation by de jure Government.*

The power given by Order xxv., r. 4, of ordering any pleading "to be struck out on the ground that it discloses no reasonable cause of action," will be exercised where, in the opinion of the Court, there is no reasonable prospect that the case raised by the pleading will succeed at the hearing of the action; *secus*, where the pleading, though it might under the former practice have been open to demurrer, presents a substantial case.

A statement of claim which sought relief on the footing that a compromise of certain disputes between a foreign *de facto* government (recognised by this country) and the Defendants was not binding upon Plaintiffs, the succeeding *de jure* government, was ordered to be struck out, on the grounds (1) that the acts of the *de facto* and recognised government by their duly authorized agents must be treated by the tribunals of this country as binding upon their *de jure* successors; and (2) that the *de jure* government after retaining with full knowledge of the facts the money paid to their predecessors as one of the terms of compromise could not afterwards repudiate the arrangement.

Applications under Order xxv., r. 4, must be tried upon the allegations contained in the pleading, and evidence in support of the applicant's case is not admissible.

MOTION by the Defendant company under Order XXV. r. 4, that the Plaintiffs' statement of claim might be struck out on the ground that it disclosed no reasonable cause of action, and was embarrassing; or in the alternative that paragraph 9 of the statement of claim and all the allegations consequent thereon might be struck out as unnecessary and tending to prejudice, embarrass, and delay the fair trial of the action.

The action was brought by the *de jure* government of the Republic of *Peru* against the *Peruvian Guano Company*, claiming to set aside an agreement of compromise of the 29th of May, 1885; to have an account taken of all dealings and transactions between the Plaintiffs and the Defendants under an agreement of June, 1876, and consequential relief.

The statement of claim contained in substance the following allegations:—

In conformity with a law of the Republic of *Peru*, enacted in that behalf on the 11th of May, 1875, a contract was on the 7th of June, 1876, entered into between the Republic and the Defendant company that the Republic should consign to the company 1,900,000 English tons of guano, and that the company as consignees should, without prejudice to the existing contracts between the Republic and Messrs. *Dreyfus Brothers, & Co.*, and others, have during the continuance of the contract the exclusive right and privilege of selling in European markets Peruvian guano. In April, 1879, the Republic of *Chili* declared war against *Peru*. On November 4, 1879, in consequence of the company's breaches of the contract, the Republic declined to further carry out and ceased to be bound by the contract. In November, 1879, *Pierola* assumed dictatorial power in *Peru*, and he, and subsequently *Iglesias*, on the resignation and flight of *Pierola*, acted as *de facto* rulers of the Republic; and between November, 1879, and June, 1886, no *de jure* government existed in *Peru*; but at the latter date a *de jure* government was duly constituted according to the laws and usage of *Peru*. Both *Pierola* and *Iglesias* purported to act as dictators so far as regarded internal acts of government in accordance with the laws and usage of the government of *Peru*, and the Plaintiffs submitted (par. 9) that so far as regarded all internal acts of government, and particularly so far as concerned the acts of the *de facto* government, as between them and the company, the *de facto* rulers were bound by the then existing laws and usage of the Republic. In May, 1883, the Defendants went into voluntary liquidation, and *Rodrick Mackay*, as liquidator, was authorized, in conjunction with a consultative committee, to compromise all claims by or against the company. In January, 1884, *Iglesias* sent to *London*, as special financial commissioner, Señor *Don G. Bogardus*, to make inquiries and claim balances due from the company under the contract. Negotiations for a settlement of claims ensued, and *Bogardus* being replaced by *Don J. R. de Izcue* as financial agent, in May, 1885, an agreement of compromise was entered into between the Republic of *Peru* and the company, being executed by *De Izcue* on behalf of the Republic of *Peru*. By the terms of this agreement *De Izcue*, on behalf of the Republic, acknowledged the receipt of £260,000 from Mr. *Mackay* as liquidator of the company, and released the company from all claims on behalf of the Republic, and agreed, on behalf of and in the name of the Republic, to uphold the company in litigations instituted against it by Messrs. *Dreyfus* and others in respect of claims to guano, and to cede to the company all the rights and interests of the Republic in respect to the subject-matters of such litigations; and it was further agreed that neither the payment of the £260,000 nor anything contained in the agreement was to be deemed to imply the inaccuracy or insufficiency of any accounts rendered by the Defendants or any right on the part of the Republic to further or better accounts, or any acknowledgment of indebtedness on the part of the company to the Republic, but was to be deemed in the first place "as the price of perpetual peace between the Republic and the company," and in the second place as the price of the rights and interests of the Republic in the subject-matters of the litigations against the company and of the engagement of the Republic to endeavour to induce the settlement of such litigations in favour of the company. In June, 1886, the *de facto* government of *Iglesias* came to an end, and a *de jure* government of the Republic, according to the laws and constitution of *Peru*, was instituted. Shortly before the constitution of such *de jure* government, investigations were made by the direction of a provisional government into the circumstances under which the agreement of compromise had been entered into, and the *de jure* government for the first time ascertained the facts stated and charged in the statement of claim. Upon making such discoveries *Don Izcue* was removed from office, and *Don Jose A. M. Quesada* was appointed Financial Agent-General for *Peru* in *Europe* in his stead. In further consequence of the discoveries a resolution of the duly constituted Government of the Republic was passed in July, 1886, declaring, among other things, first, that the government did not accept the payment of the £260,000, except as part payment and on account of the moneys owing by the company to the government; and, secondly, that the Government accepted the agreement of the compromise only in that sense; and that in the event of an attempt to give it the meaning of a final settlement, in full payment or final liquidation, the Government declared such agreement of compromise void and without any effect whatever according to the laws of *Peru*. On the 24th of October, 1886, an Act of Congress of the Republic of *Peru* was duly passed declaring all the internal acts of the said *de facto* Governments of *Pierola* and *Iglesias* null and void.

The writ in this action by the Republic of *Peru* was issued on the 7th of October, 1886, and by the statement of claim the Plaintiffs charged (par. 3) that under and by virtue of the provisions of the contract of 1876 the company became and were agents and consignees of the Republic for the guano, and became and were in a fiduciary capacity as between them and the Plaintiffs; (par. 9) that so far as regarded all internal acts of government, and particularly so far as concerned the acts of the *de facto* government as between them and the Defendants, the *de facto* rulers were bound by the then existing laws and usage of the Republic; (par. 13) that upon an examination of the accounts rendered by the company to *Bogardus* there appeared grave errors and inaccuracies, and fraudulent overcharges to the extent of nearly £2,000,000; (par. 22) that the agreement of compromise was to the knowledge of the company an improper and improvident one, and was, with the like knowledge, entered into by *De Izcue* negligently and in breach of his duty to the Republic; that the Defendants and *Mackay*, as liquidators of the company, in breach of their duty to the Plaintiffs, the company, did not furnish *Bogardus*, as agent for and on behalf of the Plaintiffs, or *De Izcue*, with information relative to the litigations, and the Republic's interest therein, although it was the company's duty so to do, and that *De Izcue* entered into the compromise upon insufficient materials and with inadequate information to the knowledge and with the connivance of the company and *Mackay*; (par. 27) that the agreement of compromise required confirmation by the Republic before the same acquired any binding effect, and that the same had not been duly confirmed or ratified by any *de jure* government of the Republic, and that although the £260,000, or the greater part thereof, was paid to *Iglesias*, the *de facto* governor of *Peru*, and although a resolution of the council of the *de facto* government was passed on the 6th of August, 1885, approving the compromise, yet such resolution, even if valid and binding (which, however, was denied), was passed upon insufficient materials and without any knowledge or information as to the actual mode in which the compromise was arrived at, or of other material facts.

Sir *H. Davey*, Q.C., *Rigby*, Q.C., and *Haldane*, for the Defendants:—

The case falls within Order XXV., rule 4, which extends the inherent jurisdiction of the Court by providing an easy and summary mode of getting rid of an action which, on the face of it, is manifestly groundless: *Metropolitan Bank* v. *Pooley* (1). It is enough for a defendant to shew that there is no reasonable prospect of the plaintiffs succeeding.

The acts on which Plaintiffs found their claim for relief are acts which the Courts of this country must treat as the acts of Plaintiffs themselves. Either, as averred by the statement of claim, they are the acts of a *de facto* government subsequently quarrelled with by a subsequent *de jure* government, or the acts of duly constituted agents. If the former, then all that the Court will look at is whether the *de facto* government is a government recognised by this country: *Emperor of Austria* v. *Day* (2). And the Plaintiffs can only obtain relief upon the terms of adopting as their own act the compromise of May, 1885, entered into between the Republic of *Peru* and the defendant company through *Bogardus* and *De Izcue*: *United States of America* v. *Prioleau* (3); and as such compromise must be adopted as a whole and not rejected in part and accepted in part, the Plaintiffs' case fails. Then if the acts complained of were the acts of Plaintiffs' agents, the Defendants, in the absence of any case disclosed of conspiracy or fraud, are not affected with responsibility to the Plaintiffs.

The Defendants, on the hearing of the motion, tendered affidavits stating certain authoritative documents, by which *Bogardus* and *De Izcue* were appointed plenary agents for the settlement of all questions in dispute between the Republic and the Defendant company.

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(1) 10 App. Cas. 210.

(2) 2 D. F. & J. 217, 233.

(3) 2 H. & M. 559.

The Plaintiffs submitted that such evidence could not be received: applications under Order XXV., rule 4, must be tried upon the allegations contained in the pleadings, which for the purposes of the motion must be assumed to be true, and no evidence is admissible in support of the Defendants' case that the pleadings, which can alone be looked at, disclose no reasonable cause of action: *Johnston* v. *Johnston* (1); *Willis* v. *Earl Beauchamp* (2).

The Court refused to admit this evidence.

Romer, Q.C., and *Bramwell Davis*, for the Plaintiffs:—

Our case is that the agreement of compromise was effected without authority and was also unconfirmed and unratified. If the Court should be against us on this point, we still rely on the allegations of fiduciary relationship between Plaintiffs and Defendants. A plenipotentiary cannot, by mere virtue of his position, pledge the credit and affect the monetary position of his government. Any engagement which he shall enter into is of no force among sovereigns unless ratified by his principal: *Kent's* International Law (3). We say that *De Izcue*, as financial agent, had exceeded his authority to the knowledge of the Defendants. In the absence of express exemption to the contrary, the powers of a plenipotentiary are limited by the condition of subsequent ratification, which is an essential form, for the instrument, in point of legal efficacy, is imperfect without it: *The Eliza Ann* (4); and to ascertain what ratification is necessary the laws of the state appointing the plenipotentiary, which have not yet been put in evidence, must be looked at. We also allege there are outstanding claims beyond the accounts rendered to the financial agents and that the Defendants have not given the information which they were bound to give.

The object of Order XXV., rule 4, was not to abolish demurrers in name only, nor to give a defendant an opportunity of getting rid

(1) 33 W. R. 239.

(2) 11 P. D. 59, 60.

(3) Page 136 (Abdy's Ed.)

(4) 1 Dods. Adm. Rep. 244, 248.

of an action upon motion, but to put a summary end to cases which were manifestly frivolous and vexatious and did not admit of serious argument: *Batthyany* v. *Walford* (1); *Parsons* v. *Burton* (2); *Burstall* v. *Beyfus* (3); *Dadswell* v. *Jacobs* (4); *Shafto* v. *Bolckow Vaughan & Co.* (5).

In looking at the pleadings as they stand to see whether there is or is not any reasonable ground of action, the Court is not to look upon them with the same strictness as it would have done on demurrer: *Dadswell* v. *Jacobs* (6).

Davey, in reply:—

The Plaintiffs must shew not only that they have alleged matter which on the pleadings discloses a possible cause of action, but they must also shew a reasonable or probable ground of action. Here not only no reasonable cause but no cause of action at all is disclosed. In the case of *The Eliza Ann* (7) Lord *Stowell* was speaking of a treaty of peace between two Governments, which can only be effected by the sovereign power, and not of the settlement of merely financial claims against a government. The case for the Plaintiffs rests solely upon the objection by the present government to the acts of their predecessors, the *de facto* government, and discloses mere shadowy allegations as a basis for interrogatories on which to build up a case.

Aug. 10. CHITTY, J.:—

This motion is made under the first branch of Order XXV., rule 4. There is some difficulty in affixing a precise meaning to the term "reasonable cause of action" used in Order XXV., rule 4. In point of law, and consequently in the view of a Court of justice, every cause of action is a reasonable cause. But obviously some meaning must be assigned to the term "reasonable." Demurrers are abolished, and it could not have been intended to abolish demurrers by the right hand and restore them by the left. So far as method of procedure was concerned, demurrers, certainly in the Court of Chancery, and in the Chancery Division at the time when these orders came into operation, were a cheap and expeditious mode of obtaining a decision; the mere substitution of a motion or summons for the demurrer would not be an adequate explanation of Order XXV. Having regard to the terms of rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

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(1) 32 W. R. 379.

(2) W. N. (1883), p. 215.

(3) 26 Ch. D. 35.

(4) 34 Ch. D. 278, 284.

(5) Ibid. 725.

(6) Ibid. 278, 281.

(7) 1 Dods. Adm. Rep. 244.

What I have just stated is intended to be not an exhaustive explanation of the rule, but merely an indication in a general way of the limits of its meaning.

It was contended for the Plaintiffs that the rule applies only to plain and simple cases, and that it does not embrace cases which are susceptible of serious argument on points of law or otherwise; and reliance was placed on the length of time which was taken up by the statement and discussion of this case at the bar. But I decline to accede to this conclusion so far as it was founded on the length of time occupied: by far the greater portion of it was consumed in reading the Plaintiffs' statement of claim, which is a lengthy document occupying some sixteen pages of closely printed matter. The application of the rule cannot depend on the length of the pleading: to hold that it does would be to hold out an encouragement to lengthy pleadings and prolixity of statement.

With these preliminary observations I proceed to consider the Plaintiffs' case as disclosed by their pleading. The object of the action is to set aside the agreement of the 29th of May, 1885, which purports to be made on behalf of the Republic of *Peru* of the one part, and by the Defendants of the other part. It is an agreement of compromise of disputes which had arisen between the Republic and the Defendants, in reference to matters of account under the contract of 1876 generally known as the *Raphael* contract. The first and one of the principal grounds relied on by the Plaintiffs is that the agreement of compromise was made on behalf of the *de facto* government of the Republic which was not the *de jure* government. But the Court is bound to take cognizance of the recognition of a *de facto* government by the government of this country, and it was admitted by Plaintiffs' counsel at the bar that the *de facto* government was duly recognised by the Queen. So soon as it is shewn that a *de facto* government of a foreign state has been recognised by the government of this country, no further inquiry is permitted in a Court of Justice here. The Court declines to investigate, and indeed has no proper means of investigating, the title of the actual government of a foreign state which has been thus recognised. This attempted distinction between the *de facto* and the *de jure* government which runs through the statement of claim is untenable.

The next point relied on by the Plaintiffs arises out of the circumstances under which the agreement was entered into. The substance of the allegations is that the Defendants were fiduciary agents, and were bound to give information with regard to the accounts. There were several points on the accounts known to the agent which were in dispute, and with reference to such points information was asked for and was refused on the part of the Defendants. It was said that this was contrary to their duty as agents in a fiduciary capacity, and that may be accepted. But the parties here were at arm's length, and this was one of the matters in dispute, and therefore was one of the matters covered by the compromise. No imputation of fraud is made against the Defendants in inducing the agent to enter into the agreement. No collusion is alleged between the Defendants and the agent. There are some other circumstances alleged which to my mind are wholly immaterial; for instance that the agreement was inequitable and was improvident: that the agent was ignorant of the English language, did not consult professional advisers, and that he acted negligently. It may be these would be grounds for the Republic taking some proceedings against their agent, but it would be no ground for setting aside the agreement if it was honestly and properly entered into. All these allegations, and indeed others to the like effect, have no bearing on such a case as that which is presented by the statement of claim.

The next point is that *De Izcue* who entered into the compromise on behalf of the Republic exceeded his authority. On this point the Defendants tendered affidavits to shew what his authority was and that it had not been exceeded. But under rule 4 no affidavit is admissible. That is plain from the terms of the rule itself. In regard to the second branch of the rule relating to the stay of frivolous and vexatious actions, the inherent jurisdiction of the Court over these actions remains unaffected, and on an application to stay a frivolous or vexatious action affidavits are admissible, not by virtue of the rule, but of the general jurisdiction of the Court. With regard to the allegation that the agreement of compromise required confirmation by the Republic, that may mean either that confirmation was required by the terms of the instrument conferring the authority, or by the general law on the subject which, the Plaintiffs' counsel urged, required a ratification by the government itself. I must I think give the pleader the benefit of the first of these propositions, and consequently it is unnecessary for me to express any opinion on the second.

But the want of authority on the part of the agent and the necessity for ratification are immaterial if the contract was in fact ratified by the Republic. The Defendants say that on the facts stated there was such a ratification. The material facts stated on this head are to be found in pars. 27, 29, 30, 31 and 34 of the statement of claim. It appears that the sum of £260,000, the consideration paid by the Defendants for the compromise, was paid to the agent of the government on or about the date of the agreement, viz., the 29th of May, 1885, and that this sum or the greater part of it was paid to the agent of the government on or about the date of the agreement, viz., the 29th of May, 1885, and that this sum, or the greater part of it, was received by the government on or before the 6th of August of that year. On that day a resolution was passed in ignorance of the facts. Being bound to accept this allegation as true, I cannot hold that this resolution was a ratification.

The statement of claim proceeds to allege that the *de facto* government came to an end in June, 1886, and that it was succeeded by a *de jure* government, and that the *de jure* government ascertained the true facts; and that in consequence of the discovery of the facts the government of the Republic on the 31st of July, 1886, passed the resolution which is stated in paragraph 30 of the statement of claim. The resolution is thus stated; "(1.) That the government did not accept, or admit as received, the said sum of £260,000 paid as aforesaid, except as part payment and on account of the moneys owing by the Defendants to the government; (2.) That the government accepted the said agreement of compromise only in that sense, and that in the event of an attempt to give to it the meaning of a final settlement in full payment or final liquidation, the government declared such agreement of compromise void and without any effect whatsoever according to the laws of *Peru*."

The effect of this resolution is plain. It is an attempt to affirm in part and disaffirm in part. A principal must act consistently; he cannot, as was stated by Lord *Kenyon* (1), blow hot and cold; or, to use Lord *Cairns*' expression, derived from the Scotch phraseology, he cannot approbate and reprobate at the same time: he must adopt entirely or repudiate entirely. It is scarcely necessary to cite any authority for these propositions. I may refer to *Wilson* v. *Poulter* (2), where the Court was clearly of opinion that the seizing of parts of certain bonds was an affirmance of the defendants' act in laying out the money, and that the plaintiff could not avow the act as to part and disavow it as to the rest. I refer also to *Smith* v. *Hodson* (3), where Lord *Kenyon* gave the judgment to which I have referred, and says (4): "Although the assignees may either affirm or disaffirm the contract of the bankrupt, yet if they do affirm it, they must act consistently throughout; they cannot, as has often been observed in cases of this kind, blow hot and cold; and as the assignees in this case treated this transaction as a contract of sale, it must be pursued through all its consequences." I refer also to *Prince* v. *Clark* (5), where *Abbott*, C.J., said it was the duty of the principal to notify his objection to the goods within a reasonable time after he received intelligence of the purchase which had been made not in accordance with the authority he had from the agent. Now the resolution here is ambiguous, but the act of the Republic in retaining the £260,000 is plain and unambiguous. The resolution admits the receipt of the money by the government which passed it, although this is not of importance, because the previous government, which I am bound to accept as a *de jure* government, had already received it. The Republic, then, with full knowledge of the facts, deliberately insist on retaining the money paid as the consideration for the release. A merchant who instructs an agent to buy goods, when the goods are bought not in accordance with the authority, cannot retain the goods; he must return, or at all events offer to return them within a reasonable time; if he does not, he adopts the transaction. Here the £260,000 would not have been paid had it not been for the agreement: in the expressive and emphatic language of the agreement itself, it was paid "as the price of perpetual peace"—between the Republic and the Defendants. The Republic retained the price with knowledge of the facts, at least from the 31st of July, 1886, to the 7th of October following, when the writ was issued. By their statement of claim delivered on the 7th of February, 1887, they, having the money still in their treasury, or having spent it, do not even then offer to return it or even to bring it into Court. All they do is to offer to bring it into account. Quite apart from the question of ratification, by reason of their having retained, for what appears to me to be an unreasonable time, the price paid for the release contained in the compromise, they could not, it is plain, obtain any judgment except upon the terms of refunding or paying into Court. Even on the argument of the case at the bar, the Republic did not offer by their counsel to bring the £260,000 or any part into Court. The result, in my opinion, is that they are within the meaning of rule 4. They do not shew any reasonable cause of action, and the statement of claim ought to be struck out.

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(1) 4 T. R. 217.

(2) 1 Str. 859, 861.

(3) 4 T. R. 211.

(4) Ibid. 217.

(5) 1 B. & C. 186, 189.

Then comes the question whether the action should be dismissed. The notice of motion does not ask in terms for the dismissal of the action, but it does ask for such other order as may be proper, and there seem to me to be two reasons why I should dismiss the action. First, the pleader has made the best of his case, I am satisfied that he could not state it better than he has stated it. Then the Plaintiffs are still deliberately retaining the money. It is a very different thing to offer to bring the money into account and keeping this large sum, as I have said, in their treasury, or, having spent it for the purpose of the Republic, and refunding it or bringing it into Court. There is no offer even now made as I understand it.

Romer, Q.C.:—No, my Lord.

It was not then by inadvertence that the offer was omitted. Not only is there no such offer, but the Plaintiffs now deliberately refuse to make it. The result, therefore, I think is that no good can come of this litigation, and that in accordance with the jurisdiction conferred upon me by the rule, I ought now summarily to put an end to the thing. I therefore strike out the claim and dismiss the action with costs, but of course allow no costs of the affidavit, which, as I have said, was not admissible.

Solicitors: *Barnes & Bernard*; *C. & S. Harrison & Co.*

F. G. A. W.

NORTH, J.

1887

June 10.

In re HERMANN LOOG, LIMITED.

Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 87, 122 [*Revised Ed. Statutes, vol. xiv., pp.* 222, 228] —*Winding-up — Scotch Agent—Scotch Action—Injunction.*

R., a Scotch solicitor, was employed in getting in the Scotch assets in the winding-up of an English company on terms that he was to look to assets of the company alone for remuneration. He commenced an action in *Scotland* against the official liquidator for taxation and payment of his costs out of the assets of the company in *Scotland*, and obtained arrestment of such assets. An injunction was granted restraining *R.* from prosecuting the action.

J. *F. CLARKE* was the official liquidator of *Hermann Loog & Co., Limited.* Messrs. *Goldberg & Langdon* were appointed his solicitors in the winding-up with the sanction of the Court. The company had agencies and property in *Scotland.* At the commencement of the winding-up a debenture holder's action against the company was pending, in which a receiver had been appointed. There was a dispute as to whether the Scotch assets were subject to the debentures. An agreement was come to, which received the sanction of the Court, that the English assets should be collected by the receiver in the debenture-holder's action, and paid into a bank without prejudice to the rights and priorities of persons interested, and that the Scotch assets should be collected by the official liquidator and paid into the same bank in the same way.

Messrs. *Goldberg & Langdon* appointed Mr. *William Craig Ramsay*, solicitor, of *Glasgow*, agent in *Scotland* for the purpose of assisting in getting in the Scotch assets, on terms that Messrs. *Goldberg & Langdon* should not be personally liable to him for his remuneration, but that he was to look to the assets of the company alone for payment. Mr. *Ramsay* did certain work in getting in assets. He commenced an action against the liquidator in the Court of Session for his remuneration, he obtained taxation of his bill of costs in *Scotland*, and the arrestment of money part of the assets of the company in *Scotland*, as to part in the hands of an auctioneer, and as to part in a bank.

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In re HERMANN LOOG, LIMITED.

This was a motion on the part of the liquidator to restrain *William Craig Ramsay* from taking or continuing further proceedings in *Scotland* in respect of his bill of costs.

The Respondent *Ramsay* made an affidavit containing the following paragraph:—

"According to Scotch law while assets are in *Scotland* a creditor in *Scotland* is entitled to arrest those debts, both to found jurisdiction for an action in *Scotland* against an English debtor and also for the purpose of attachment. The action instituted by me is not to make Mr. *Clarke* personally liable, but is to obtain a speedy taxation of my costs before the proper officer in *Scotland*, and also to establish judicially my lien before the assets left the country, and also to get an order for payment.

"In support of my action I refer to the opinion of Mr. *R. Strachan*."

The opinion of Mr. *R. Strachan* and the case submitted to him were made an exhibit.

The opinion was as follows:

"In my opinion a solicitor has by the law of *Scotland* a lien for his accounts over all money and documents belonging to his clients coming into his hands in the ordinary course of business.

"By the law of *Scotland* a solicitor who has been employed by an English client, whether as private individual or official liquidator, is entitled to found jurisdiction by arresting funds belonging to his client and thereafter to raise an action against him in the Scottish Courts for payment of his business accounts. Such an action can competently be raised in *Scotland* against an official liquidator resident in this country, and it appears to me to be equally competent to sue an official liquidator resident in *England* after founding jurisdiction against him by arresting funds or property belonging to him in that character.

"After founding jurisdiction and raising an action in *Scotland* against an official liquidator resident in *England*, a solicitor is entitled, in my opinion, according to the law of *Scotland*, to arrest in security of his debt and stop in *Scotland* all funds and property in that country belonging to his client."

Cookson, Q.C., and *Emden*, for the Liquidator:—

The proper mode for Mr. *Ramsay* to get paid is to come in under the liquidation, he has no right against the liquidator, under the very terms of his contract such right is excluded. Any action of this kind brought in *England* would be restrained under sect. 87 of the *Companies Act*. Proceedings under that section, like other proceedings in the winding-up, can be enforced in *Scotland* by virtue of sect. 122: *In re International Pulp and Paper Company* (1).

Haldane, for *Ramsay*:—

I admit that the jurisdiction extends to *Scotland*. Mr. *Ramsay* is not breaking his contract in suing the official liquidator, he is suing in his representative character. My case is, that *Ramsay* having done work in *Scotland* in recovering the assets he has arrested, is entitled in all fairness to be paid out of those assets according to the Scotch scale of charges, and has a right to have his bill taxed by the Scotch Courts and to pursue his remedy in *Scotland*. If he has made a mistake in not applying to the Court for leave to take these proceedings that can at most be a question of costs, and the Court will now give him leave to go on with his action in the Court of Session. It is doubtful whether proceedings to recover costs incurred in a winding-up are within the sections of the Act which are aimed at stopping legal proceedings, if they are the Court will in such cases as this allow them to go on: *Ex parte Smith* (2).

NORTH, J.:—

In this case the official liquidator employed Messrs. *Goldberg & Langdon* as his solicitors. They are solicitors in *England*. It was necessary that certain business should be done in *Scotland*, legal and otherwise, and *Ramsay* was employed by them for that purpose; he was told, on behalf of the liquidator, that he was not to be personally liable, but that he must look to the assets of the company alone for payment. Beyond all question he has done some work and he is entitled to be paid, and he will get paid what is due in the liquidation. But by way of getting payment in the way he thought most advantageous to himself he stopped the assets in *Scotland*, his view being that it would be better for him to enforce payment in that manner. It is a very intelligible view. The question is whether he is legally entitled to take that step. In my opinion he is not; he is not entitled to stop the assets and prevent their getting into the hands of the liquidator; and it is said he is doing so by virtue of some lien or right the law of the country gives him. I feel a difficulty in following the view taken by himself or by Mr. *Strachan*, or by counsel in this Court. It seems to me he is endeavouring to take a step the law does not allow, and he is no more entitled to attach the assets than an English agent employed for a similar purpose would have been to bring an action. An English agent would have a right to be paid by means of an application in the winding-up, but not by means of attaching assets. The cases are exactly parallel. It seems to me that the step the Respondent has taken was wrong and he must be restrained, and inasmuch as he has acted deliberately, with his eyes open, he must pay the costs of this application.

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(1) 3 Ch. D. 594.

(2) Law Rep. 3 Ch. 125.

Solicitors for Official Liquidator: *Goldberg & Langdon.*
Solicitors for Respondent: *Barnard & Co.*

D. P.

KEMP *v.* GOLDBERG.

[1886 K. 1224.]

NORTH, J.
1887
June 10.

Practice—Mortgage—Foreclosure—Particulars of Receipts.

It was alleged by counter-claim to a redemption action that the mortgage comprised: (1) Certain commission; (2) a sum also secured by bills of exchange; (3) a sum due on open account, and that the mortgagee had received divers sums in respect of the bills of exchange and on the open account. The mortgagee counter-claimed for an account and foreclosure or sale. Particulars of the sums received by him on the bills of exchange and open account were ordered to be given.

THIS was an action for the redemption of a bond, certain real estate in *Jersey* charged by an "act" or judgment of the Royal Court of *Jersey*, and certain policies of life assurance. The Plaintiff alleged that he had paid all sums due in respect of the mortgages, and claimed restitution of the mortgaged property,

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or, in the alternative, if it should be held he had not paid all moneys due on the securities, an account and redemption.

The Defendant put in a defence and counter-claim. By his defence he alleged that large sums were still due on the security of the mortgages. By his counter-claim he alleged that commission on a sale effected through him to the amount of £547 was due to him from the Plaintiff, who formerly carried on business as *William Wilson & Co.*, and was secured by the mortgages, and that "at the date of the said sale the Plaintiff was also indebted to the Defendant in the sum of £5063 17*s*." . . . "the sum of £3135 17*s*. 5*d*., part of the said sum of £5063 17*s*., was secured by bills of exchange drawn upon and accepted by the Plaintiff on the said firm of *William Wilson & Co.*, and the said sum of £1927 19*s*. 7*d*., the remainder of the said sum of £5063 17*s*., was due on open account." Paragraph 6 was as follows: "All the said bills of exchange have become due, and the Defendant has since the date of the said sale received divers sums in respect thereof, and other sums in respect of the moneys due to him on open account as aforesaid, but after giving credit for all moneys so received a large balance is still due and owing from the Plaintiff to the Defendant, together with interest at the rate of £5 per cent. per annum on the balance from time to time owing." The Defendant claimed (1) an account; (2) foreclosure or sale.

The Plaintiff by procedure summons asked for particulars of the payments mentioned in the sixth paragraph of the counter-claim.

Stutfield (*H. A. Forman*, with him), for the summons:—

It is only fair that the Plaintiff should have particulars of the receipts referred to in the 6th paragraph of the counter-claim to shape his course, it may be that when he knows what the amount claimed is he will tender payment, and save the expense of further proceedings.

D. L. Alexander, for the Defendant:—

In a mortgage action where an account is asked for it is not the practice to give particulars, to do so would in fact be anticipating the account that must be taken: *Blackie* v. *Osmaston* (1); *Augustinus* v. *Nerinckx* (2).

(1) 28 Ch. D. 119.

(2) 16 Ch. D. 13.

NORTH, J. :—

I think the Plaintiff is entitled in substance to what he asks for. The counter-claim is not for a mere balance alleged to be due, and the Plaintiff should have particulars of the receipts and payments referred to in the sixth paragraph of the counter-claim. I think so for this reason. This is a claim for a definite sum, and nothing else. The only pretence for saying that the counter-claim is not for a definite sum is because the Defendant has received considerable sums on account, and he declines to state what those sums are. It is quite true he asks for an account. But what right has he to put it on the Defendant to have an expensive account taken. It seems to me a case in which common sense requires that the Defendant, who has the sole means of knowledge, should state what he has received. The Plaintiff will have the opportunity if he knows the amount of paying off the balance claimed, and the cases referred to do not bear on this case at all. Both the cases were in the Court of Appeal, and I need hardly say if they had any bearing I should feel myself bound strictly to follow them. In the first place this is a case in which the sum claimed is a definite sum. In the next place it is not a matter of course that particulars should be given. If an account is asked for by a claim or counter-claim, and the Court sees an account will be necessary, there may be very good reasons for saying no particulars should be given, and that the account shall not be given twice over. But it does not seem to me that merely because an account is asked for particulars should be refused. If in a case of a simple foreclosure action the plaintiff had been in receipt of rents and profits, and the defendant said he did not know what to pay or tender, the fact that the plaintiff asked for an account would not be sufficient reason to refuse to give particulars. I think this is a case in which the particulars asked for in respect of the sixth paragraph of the counter-claim should be given.

Solicitor for the Plaintiff: *H. G. Smallman.*
Solicitor for the Defendant: *H. Bentwitch.*

D. P.

NORTH, J.
1887
June 10, 14.

In re BALL.
SLATTERY *v.* BALL.

[1887 B. 1319.]

Will—Construction—"Die without leaving issue."

A testator bequeathed personal estate on trust after the death of *W. K. B.* for *W. R. B.*, and in case *W. R. B.* died without leaving issue male for *J. B.* *W. R. B.* died in the lifetime of *W. K. B.*, having had only one son, who died an infant in his father's lifetime:—

Held, that the gift over to *J. B.* took effect.

White v. *Hight* (1) not followed.

THIS was a motion on the part of *George Keith Ball*, a Defendant, to have the statement of claim struck out on the ground that it disclosed no reasonable cause of action against the moving Defendant, and that the action might be dismissed as against him with costs. The object of the motion was to raise a question on the construction of the will of Sir *Alexander John Ball*, deceased. The testator bequeathed his "whole fortune of money, chattels, stocks, funds, securities, and all other his personal estate of what nature soever" to trustees on trust to sell and convert the same into money and invest the proceeds "in the purchase of real estate, or upon parliamentary or real securities at interest, or in the purchase of stock in any of the public funds," and pay his wife, *Mary Ball*, an annuity for life, and on trust after his eldest son, *William Keith Ball*, attained twenty-five years of age, to pay the income to him during his life. The testator declared his will to be that in case his son *William Keith Ball* should marry and have children lawfully begotten, the whole of the interest of his aforesaid trust estates should from and after the death of the said *William Keith Ball* go to the use of his first son lawfully to be begotten and the heirs male of the body of such first son issuing, and for default of such issue for the other sons of *William Keith Ball*, and their heirs male successively, and for want and in default of such issue male the whole of the interest of the testator's said trust estate should go to and for the use of *William Robert Ball* (in the will called *Robert Ball*), a nephew of the testator, subject to certain annuities which never became or had long ceased to be payable; "and in case the said *Robert Ball* shall die without leaving issue male lawfully to be begotten," it was the testator's will and desire that the interest of his trust estate, subject to the annuities, should go to *John Ball* and the heirs male of his body lawfully to be begotten according to seniority of age and priority of birth.

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(1) 12 Ch. D. 751.

The testator died in 1809, shortly after the execution of his will. His widow died in 1832. *William Robert Ball* died in 1844, having had issue one child only, a son, who died an infant of tender years in his father's lifetime. *William Keith Ball* died in 1874 without having had any child. In an action of *Evans* v. *Ball* (1875 E. 13a), which ultimately went to the House of Lords, it was declared, that according to the true construction of the testator's will no part of his estate was converted in equity, but the same retained its quality of personal estate.

The Plaintiff was one of the next of kin of *William Robert Ball.* The Defendants were Dame *Louisa Ball,* the present trustee of the will of Sir *Alexander John Ball,* and *George Keith Ball,* one of the sons of *John Ball.* The Plaintiff claimed to have it declared who were entitled to the residuary estate of the testator, and, if necessary, administration.

Cookson, Q.C., and *Dauney,* for the motion:—

Such an expression as "shall die without leaving issue," as applied to bequests of personal estate, always has been applicable to the case of there being no issue living at the death of the person named: *Forth* v. *Chapman* (1); *Crooke* v. *De Vandes* (2); unless there are special circumstances, which do not exist here, to make such a construction improper.

Kenyon Parker, for the Plaintiff:—

The interest of *William Robert Ball* became absolute upon his having a son. The Court struggles to maintain a vested interest, and will construe the words "without leaving issue male" as equivalent to "without having had issue male." The case

(1) 1 P. Wms. 663.

(2) 9 Ves. 197, 203.

nearest the present is that of *White* v. *Hight* (1), which is absolutely undistinguishable from the present. Other cases where a similar construction has been adopted are, *Treharne* v. *Layton* (2); *Marshall* v. *Hill* (3); *Ex parte Hooper* (4); *In re Jackson's Will* (5); *Casamajor* v. *Strode* (6); *White* v. *Hill* (7).

Cookson, in reply:—

The Court will not lightly put a forced meaning on clear words; in all the cases cited except *White* v. *Hight*, where the Court has construed "leaving" children or issue as equivalent to "having had," it has done so to prevent the divesting of a clear vested prior gift to such children or issue. *White* v. *Hight* professed to follow the principle of the other cases; if it can be supported at all it cannot be supported as laying down a new principle, and can only be upheld as a special case not affecting other wills.

1887. June 14. NORTH, J.:—

The important question for consideration here is, what is the meaning of the gift over in case *William Robert Ball* shall die without leaving issue male. This is personal estate, and the will is a will of 1809. I do not think it makes any difference, inasmuch as it is personal estate, that it was before the *Wills Act* was made; and according to numerous cases, of which *Forth* v. *Chapman* (8) is always referred to as the leading authority, if the gift had been "if he should die without issue" it would have meant without issue living at his death; and all doubt on that point, if there could be any, is removed by the fact that the words here are "shall die without leaving issue male," which, beyond all question, unless those words are read in some secondary sense, would mean without leaving issue living at his death. Now, it is quite clear that it was the intention of the testator that the previous gift should be divested in some event, in the event of his dying without leaving issue male living at his death, whatever these words may mean; and that is the event, taking those words literally, that actually has happened. He died without leaving any issue living at his death because, though he had one child, that one child died before him and without issue. Now the contention on the part of the Plaintiff is that the words "shall die without leaving issue male" are to be read "without having had issue male," and reliance is placed on a series of authorities in which for certain reasons the word "leaving" has sometimes been construed as equivalent to "without having had." The first case cited was *Ex parte Hooper* (1), but that is not very much in point. The words were different. The decision might stand on totally different grounds, and, as was pointed out in the note in *Jarman* on Wills (2), the decision of the Vice-Chancellor on that point has been misunderstood on several occasions; and it does not seem to me to be really an authority bearing very much on the point in question. The proposition in *Jarman* on Wills is laid down thus (3): "It has been noticed in a former chapter that where a legacy is given to one for life, and after his death to his children, with a gift over if the tenant for life dies without leaving children, the gift over is sometimes construed as meaning in default of objects of the prior gift, or, as it is commonly expressed, 'leaving' is construed 'having.' Besides the favour always shewn to provisions for children, it requires very strong words to defeat a prior vested gift. Thus in *Maitland* v. *Chalie* (4), where a testator bequeathed a sum of money in trust for his daughter *S.* for life, and after her death, as to a moiety thereof, for her children equally to be divided between them at their respective ages of twenty-one, and if but one, then to that one at twenty-one, with maintenance during minority; and if any of such children should die before attaining twenty-one, his share to go to the survivors; but in case *S.* should die without leaving any child or children, or leaving such and they should die before attaining twenty-one, then to testator's next of kin living at the death of the longer liver of them his said daughter and her children so dying under age. *S.* had issue two daughters who attained twenty-one, but died in their mother's lifetime. Sir

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(1) 12 Ch. D. 751.
(2) Law Rep. 10 Q. B. 459.
(3) 2 M. & S. 608.
(4) 1 Drew. 264.
(5) 13 Ch. D. 189.
(6) 8 Jur. 14.
(7) Law Rep. 4 Eq. 265.
(8) 1 P. Wms. 663.

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(1) 1 Drew. 264.

(2) 4th Ed. vol. ii., p. 466.

(3) 4th Ed. vol. ii., p. 823.

(4) 6 Madd. 243.

NORTH, J.
1887
In re BALL.
SLATTERY *v.* BALL.

J. Leach, V.C., said: 'A clear vested gift is in the first place given to the children of a daughter attaining twenty-one. If in the clause which gives the property over on failure of her children, the word "having" be read for "leaving" the whole will will express a consistent intention to that effect. I feel myself bound by the authorities to adopt this construction,' and he cited *Woodcock* v. *Duke of Dorset* (1) and *Powis* v. *Burdett* (2), and he declared that the two daughters having attained twenty-one took vested interests." Another case where the rule was clearly laid down was *White* v. *Hill,* before Lord *Hatherley* when Vice-Chancellor (3). There certain property was given in trust for the daughter for life and after her death between all her children, if more than one, their heirs and assigns; if but one to his or her heirs and assigns; in case the daughter should depart this life under twenty-one or afterwards without leaving any child or children, then the property was given over. It was held that the children of the daughter took at their births indefeasible interests in fee, in remainder expectant on the death of their mother. The Vice-Chancellor says, after referring to *Ex parte Hooper* (4), "The case of *Ex parte Hooper* is rather weaker than the present, because the principle which has prevailed in all these cases is, that where you find an intention that a child shall take a vested interest at a particular period, and words introduced which would divest the interest in the event of the parent dying without leaving the child surviving, if the interest has once vested, the Court, considering that the testator has intended to make provision for the child, will, unless the testator has too clearly expressed his opinion to admit a doubt, struggle to maintain the vested gift rather than take it away from the issue in favour of some collateral objects." Then, passing over a further reference to *Ex parte Hooper,* he says: "In the other case that has been cited, of *Kennedy* v. *Sedgwick* (5) there was found an additional circumstance which strengthened the case, namely, a direction that it should vest in the children at twenty-one; and then there was a gift over in the event of the parent dying without leaving children. In that case 'leaving' was construed 'having.' The intent to vest was plain and manifest—the intent to divest was not so plain and manifest. 'Leaving' is a word that may be construed, in its primary sense, as leaving on the decease of the person to whom the word applies; but it has been construed as 'having,' rather than that a child shall be deprived of a vested interest which seems to have been made as a provision for it." And then a little further on he says: "The circumstances of this case fully justify me in applying the principle, originally founded on marriage settlements, that the Court will favour a plain intention to provide for children, where the contest is between surviving children and the representatives of deceased children. The testator has here made careful arrangements for the division of his property among his children; and the contest at this moment is between a son of the tenant for life, who may be living at her death (she is now living), and her brother." Therefore he extended the case of settlement to wills. Then a little further on he said: "The only question I have to consider is, whether the word 'leaving' can be construed here as 'having,' and I find that it has been so construed in like cases. I can find no substantial difference between vesting at twenty-one, and vesting at birth; and then all the cases say, if there is a vested interest it shall not be divested by the simple word 'leaving' in a case of this kind, where a parent is providing for children by his will. It cannot deprive the family of one of the children of that provision because the child does not survive the tenant for life." Then there was another case in the Court of Exchequer Chamber, in which the same principle was acted on, of *Treharne* v. *Layton* (1). The facts there were these, that the property was given to the granddaughter of the testatrix *Martha Hudson* for life and after her death to her children in equal shares, and if she died leaving no issue the whole of the property was to go over to the next-of-kin. There the words "leaving no issue" were construed as "having had no issue," and Baron *Cleasby*, who delivered the judgment of the Court, says (2): "We think that the authorities applicable to this case are so clear and so strong that we should not be justified in saying that they are wrong. The position they lay down is, that where an estate is vested in children after a gift to a parent, then the gift over in case of the parent dying, without leaving issue, must be read 'having had no issue,' in order to carry into effect the intention of the testator: and this rests upon the highest authority and goes back further than the case of *Maitland* v. *Chalie* (1), which was a decision of Vice-Chancellor *Leach*." Then he quotes what I have already stated from *Jarman* on Wills, and I do not refer to it further. The case most relied on by Mr. *Parker* is the case of *White* v. *Hight* before Vice-Chancellor *Bacon* (2), which seems to me quite distinguishable from the cases which have been referred to. In that case the testator gave certain real estate to his granddaughter absolutely. Then there was this gift: "In case the said *Alice White*, my granddaughter, shall happen to depart this life before the decease of her said mother or after her decease without leaving any issue" —which may therefore be read "shall happen to die without leaving any issue"—"then and in such case I give and bequeath and devise" the property over. In that case, therefore, it was not a gift for a limited interest with remainder over to other persons, in default of any of whom being living at the death of the first taker the gift over was to take effect; but there was an absolute gift to the first taker subject to being divested, and it is more like the present case than some of those which I have already referred to. There the Vice-Chancellor came to the same conclusion as was come to in the other cases, that there was a vested gift that could not be divested. I confess I have a good deal of difficulty in seeing what was the ground on which he went; but there is one thing quite clear, that what he purported to do was to follow the previous decisions on the subject. Now the principle of those decisions is that the Court will read the words "without leaving" as equivalent to "without having had" if the result of so doing is to make the whole instrument consistent, to make a gift over fit in with the intention of the testator as previously expressed, and avoid divesting a previously vested gift. But unless that result is attained the reason for the modification of the language fails, and I have been unable to find any case except *White* v. *Hight* in which the effect of the construction adopted has

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(1) 3 Bro. C. C. 569.

(2) 9 Ves. 428.

(3) Law Rep. 4 Eq. 265, 269.

(4) 1 Drew. 264.

(5) 3 K. & J. 540.

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(1) Law Rep. 10 Q. B. 459.

(2) Law Rep. 10 Q. B. 461.

(1) 6 Madd. 250.

(2) 12 Ch. D. 751.

been—not to avoid divesting a vested gift, but—to leave a vested gift still liable to be divested, though only in a different event from that in which the divesting would have taken place if the word "leaving" were construed literally. If the latter course, that is, construing the word "leaving" literally, is adopted in the present case the absolute interest of *William Robert Ball* would be divested by his death without leaving issue then living. If the word "leaving" is treated as equivalent to "having had" the absolute interest of *William Robert Ball* would be divested by his death without having had any child. Whichever view is adopted the will clearly contemplates the divesting in some event of the previously vested gift to *William Robert Ball.* I find no case except *White* v. *Hight* (1) in which the word "leaving" is read as "having had" with the result merely of altering the event upon which the divesting of a gift previously vested is to take place: and I do not find this point dealt with in the judgment of the learned Vice-Chancellor in *White* v. *Hight.* It makes that case a new case; whereas the Vice-Chancellor treats it as covered by the authority of the old cases, and decides it on the ground that he is following them. I feel bound with him by those authorities, but I should go beyond them if I gave effect to the contention of the Plaintiff, and I cannot find any principle laid down in *White* v. *Hight* to warrant any such contention. So far as I am aware *White* v. *Hight* has not been followed by any other Judge, for in *In re Jackson's Will* (2), it was not cited, and the passage relied on in the judgment of Sir *George Jessel* has no bearing on the present case. Under those circumstances I accede to the application, and the statement of claim must be struck out.

Solicitors: *R. C. Hanrott; Parker, Garrett & Parker.*

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(1) 12 Ch. D. 751.

(2) 13 Ch. D. 189.

D. P.

NORTH, J.
1887
July 14.

In re COLLINGE'S SETTLED ESTATES.

[1886 C. 2675.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 6, *s.* 19—*Tenant for Life—Undivided Share.*

The tenant for life of an undivided moiety of land, where the other undivided moiety is out of settlement, cannot sell the moiety of which he is tenant for life without the concurrence of the owner of the other undivided moiety.

JAMES COLLINGE, by his will, dated April, 1852, devised and bequeathed the *White Lion Inn* and three cottages, stable and premises at *Rawtenstall*, and all other his real and leasehold estates, stock-in-trade, and interest in business premises, to trustees upon trust after the death of the testator's wife to apportion or divide the whole of the said rents and profits between his said sons *James* and *John* in equal shares during the term of their respective lives, and after the decease of either of his said sons, upon trust to divide the same rents and profits unto and equally between the testator's surviving son and the issue then living of such deceased son, to take their, his, or her parent's share only, and after the decease of the survivor of them the testator's said sons *James* and *John* upon trust to sell the testator's said real and leasehold estates, and to divide the money to arise from such sale and the rents and profits until sale into two equal parts or shares and to pay one of such parts or shares to the issue of the testator's son *James* in equal shares, and the other of such parts or shares to the issue of the testator's son *John* in equal shares; but in case the testator's sons or either of them should die without leaving issue, then upon trust to pay one moiety or equal half part of the moneys or proceeds of the said sale and the rents and profits until sale to such person or persons as such son or sons so dying without issue should bequeath the same by will. The will did not contain any limitation or disposition of either moiety or half part of the proceeds of the said sale in case of the sons, or either of them, dying without issue and without exercising his power of appointment.

The testator died on the 30th of April, 1852. His wife survived him and died in April, 1876. The testator's son *John*, died in January, 1876, without having ever been married and without having exercised the power of appointment given him by the testator's will. One moiety of the settled real estate consequently descended to the testator's other son, *James Collinge*. *James Collinge* had issue, now living. The only real estate remaining subject to the trusts of the will were the *White Lion Inn* and cottages and stables at *Rawtenstall. James Collinge*, the testator's son, sold and conveyed to a purchaser the moiety of the *White Lion* cottages and stables which he inherited. On the 3rd of August, 1886, an order was made appointing the applicants trustees of the settlement made by the will of the testator for the purpose of the *Settled Land Act*, 1882.

James Collinge, the son, had served notice on the Applicants as such trustees of his intention to sell the moiety of the premises subject to the trusts of the will of which he was tenant for life. This was a summons by the trustees to have it determined whether *James Collinge*, as tenant for life of the settled moiety of the land, was entitled under the *Settled Land Act* to sell that moiety.

Upjohn, for the Trustees:—

Where undivided parts of realty are settled so that there are separate tenants for life of different undivided parts, the tenants for life cannot sell separately. There seems no reason why a tenant for life of an undivided part should have any greater power when the other undivided part is unsettled or has been taken out of settlement. *In re Atkinson* (1), so far as it is an authority on the section, shews that the Court will not extend the powers of a tenant for life under the Act to persons not strictly within the definition in the Act.

Ryland, for *James Collinge*, the son:—

The particular case is not expressly provided for in the definition of a tenant for life, sect. 2, sub-sect. 6. So far as this phrase "tenant for life" is not cut down by definition the phrase is to have its widest meaning. *In re Atkinson* (1) bears out that rule of construction. Where an undivided moiety is out of settlement the owner of that moiety is independent of the persons interested in the other moiety, he has an advantage over the tenant for life if the latter is dependent on him and he is free; that is a good reason for not restricting the tenant for life. There is nothing inconsistent with this interpretation in any of the other provisions of the Act, the only provisions that can be thought to bear on the point are sect. 2, sub-sects. 3, 5, and 6 and sect. 19.

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(1) 30 Ch. D. 605; 31 Ch. D. 577.

NORTH, J.:—

There are only two or three sections of the Act which have been mentioned to me, and I do not remember any other which bears on the question. The first of these is sect. 2, sub-sect. 3, which provides that "land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land." If that had been intended to mean an undivided share in land I should have expected the sub-section to say so, for there are other sections in the Act where undivided shares are recognised. Then sub-sects. 5 and 6 of the same section are well worthy of being considered, though in my opinion they do not either of them settle the point. Sub-sect. 5 provides: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land for his life" is made tenant for life under the Act. In the present case *James* is not entitled to the beneficial possession of the land for his life, but only to possession of an undivided moiety of land. Sub-sect. 6 is important, not as hitting this particular case, but as shewing that the Act recognises the case of there being tenants for life of undivided moieties. It provides that where there are two or more persons having life interests—for that is the meaning of the word "so"—"entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life" under that settlement. It does not say that each shall be tenant for life. And less than two will not do. If then the case had arisen during the lifetime of

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(1) 30 Ch. D. 605; 31 Ch. D. 577.

NORTH, J.
1887
In re COLLINGE'S SETTLED ESTATES.

James and *John* neither could have sold alone. And it is not easy to see why, if *James* alone could not sell during the lifetime of *John*, he can sell alone when the other moiety is in the possession of a stranger. Then again the 19th section provides that where "under the settlement the settled land has come to be held in undivided shares,"—that is what has happened here—"the tenant for life of an undivided share may"—do what? not sell, but—"join or concur in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share." Now Mr. *Ryland* says that means that the tenant for life of an undivided moiety may, if he likes, join with other persons, but does not prevent his acting alone. I think if this had been meant it would have been said. The Legislature thought the concurrence of the two necessary, and there are obvious reasons why it may be undesirable in the interest of those entitled in remainder, whom the Legislature has taken care to protect, that a tenant for life should have the power to sell one undivided moiety apart from the rest of the land. I hold, therefore, that in this case the tenant for life cannot sell unless he can get the concurrence of the owner of the other moiety.

As to costs I shall give the tenant for life no costs, and give the trustees leave to apply for their costs on the realization of any part of the estate.

Solicitors for all parties: *Clarke, Woodcock, & Ryland.*

D. P.

NORTH, J.

1887

Aug. 2.

SAVILE *v.* COUPER.

[1887 S. 417.]

New Trustees—Appointment of separate Set of Trustees of Part of Trust Property held on distinct Trusts—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 5, *sub-s.* 1.

Sect. 5, sub-sect. 1, of the *Conveyancing Act*, 1882, authorizes the appointment of a separate set of trustees for a part of the trust property held on distinct trusts only when an appointment is being made of new trustees of the whole property.

It does not enable the existing trustees of the whole property to retire from the trusts as to part by means of an appointment of new trustees of that part.

ORIGINATING SUMMONS by the trustees for the time being of the will, dated the 17th of April, 1868, of *Robert Dykes*, who died on the 7th of February, 1872.

The Defendants were three ladies, who were the tenants for life of a legacy of £50,000, bequeathed by the will on certain trusts distinct from the general trusts of the will. The summons asked the determination by the Court, under rule 3 (*g*) of Order LV. of the Rules of the Supreme Court, 1883, of the question, whether the trustees were authorized and empowered under the provisions of the will, or otherwise by law, to retire or be discharged from the trusts of the will, so far as the same related to the legacy of £50,000, and to appoint a separate set of trustees of that legacy, or of the trusts of the will relating thereto, the Plaintiffs themselves remaining trustees of the rest of the property subject to the trusts of the will.

Under the will the Plaintiffs had a power of appointing new trustees thereof in certain events, but the power did not enable them to appoint separate trustees of the £50,000. The question was whether they could do so under sect. 5 of the *Conveyancing Act*, 1882.

Ingle Joyce, for the Plaintiffs:—

It would be a narrow construction of sect. 5 (1) of the *Convey-*

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(1) Sect. 5, sub-sect. 1: "On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part."

NORTH, J.
1887
SAVILE
v.
COUPER.

ancing Act to hold that a separate set of trustees can be appointed for a part of the trust property held upon distinct trusts, only when new trustees are being appointed of the whole of the trust property. *In re Paine's Trusts* (1) does not apply, because there the Court had ample jurisdiction under the *Trustee Act.*

Lewin on Trusts (2) is in favour of the wider construction.

[NORTH, J., referred to *In re Hetherington's Trusts* (3).]

R. C. Dobbs, for the Defendants, did not object to the proposed appointment, if the Act gave power to make it.

NORTH, J.:—

I do not think that the proposed appointment comes within the scope of sect. 5. It seems to me that what the section contemplates is, the retirement of all or some of the existing trustees, and that there may be a difficulty in procuring new trustees to act in the entire trusts, and that it may be expedient to divide the trusts in order to get rid of that difficulty. I think the section does not contemplate the creation for the first time of a distinct trust as to a part of the trust property when the existing trustees of the whole are not retiring. The words point to the exercise of the power "on an appointment of new trustees," *i.e.* when the old trustees are ceasing to be trustees altogether. I am asked to read the section as if it had said that separate trustees may be appointed for a distinct part of the trust property whenever it may be thought desirable to do so. That is not what the section says, and I do not think that the present case comes within the words. One can easily conceive cases in which it might be desirable to do what is now proposed, but they are not likely to happen frequently, and I do not think they were in the contemplation of the framers of the section.

Solicitors for Plaintiffs: *J. E. Fox & Co.*, agents for *H. & B. J. Ford, Exeter.*

Solicitors for Defendants: *Murray, Hutchins, & Stirling.*

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(1) 28 Ch. D. 725.
(2) 8th Ed. p. 667.
(3) 34 Ch. D. 211.

W. L. C.

NORTH, J. 1887 Aug. 2, 3.

In re COMMERCIAL BANK OF SOUTH AUSTRALIA.

Bill of Exchange—Dishonour—Damages—Bill dishonoured abroad—Interest—Re-exchange—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 57.

Held, on the construction of sect. 57 of the South Australian *Bills of Exchange Act*, 1884 (which for this purpose is identical with sect. 57 of the English *Bills of Exchange Act*, 1882 (45 & 46 Vict. c. 61)), that, when a bill of exchange has been dishonoured abroad (*i.e.* out of the colony) the only damages which the holder can recover are the amount of the re-exchange, with interest thereon, as provided by sub-sect. 2 of sect. 57, and that he has no option to sue for interest under sub-sect. 1.

THIS was a claim by the *Commercial Banking Company of Sydney* (hereinafter called the *Sydney Company*), to prove in the winding-up of the *Commercial Bank of South Australia* for additional interest, at the rate of 5 per cent. per annum, upon the amount of a bill of exchange, in respect of which they had been already admitted to prove in the winding-up with interest at 5 per cent.

The *Commercial Bank of South Australia* was incorporated by an Act of the South Australian Legislature, and was not registered in *England*. It carried on the business of bankers in *Australia* and also in *London*, the head office being in *Australia* and there being a branch office in *London*. In February, 1886, the company suspended payment both in *Australia* and in *London*. There were a considerable number of creditors and assets to a large amount in *England*, and some of the shareholders were resident in *England*. On the 8th of June, 1886, an order for the compulsory winding-up of the company was made by *North*, J., on the petitions of some English creditors (1). A winding-up order had been made in *Australia* on the 12th of April, 1886.

The *Sydney Company* in January, 1886, purchased from the *Commercial Company* at *Adelaide*, in *South Australia*, a bill of exchange for £15,000, dated the 21st of January, 1886, drawn by the *Commercial Company* on their *London* branch in favour of the *Sydney Company*, and payable sixty days after sight. This bill was presented to the *London* branch for acceptance on the 1st of

(1) *Vide* 33 Ch. D. 174.

March, 1886, when acceptance was refused, because the bank had then stopped payment, and the bill was not paid at maturity.

The *Sydney Company* claimed in the English winding-up to be paid the amount of the bill, with interest thereon at 10 per cent. per annum (that being the Australian rate of interest), from the date when the bill became due to the date of payment. Interest was claimed, because it was admitted that the assets of the *Commercial Bank* would be more than sufficient to pay their creditors in full.

The claim was admitted by the Chief Clerk with interest at 5 per cent., without prejudice to the right of the *Sydney Company* to receive additional interest at the rate of 5 per cent. if the Court should hold that they were entitled to the colonial rate of interest.

The *Sydney Company* brought in a claim for the additional interest.

The Court in *Adelaide* had allowed interest at 10 per cent. on similar bills which had been proved in the Australian winding-up.

Theobald, for the *Sydney Company*:—

The winding-up in this country is, as your Lordship said when the winding-up order was made (1), ancillary to the winding-up in *Australia*. If the bill had been sent out to *Australia* and the proof had been made in the winding-up there, the Colonial Court would have allowed interest at 10 per cent., as it has done in similar cases, and the creditors ought not to be in a worse position because they have saved the company the expense of re-exchange, which would have been caused by sending the bill to *Australia*. Interest is given as damages, and the damages ought to be assessed according to the law of the place at which the bill was drawn: *Allen* v. *Kemble* (2); *Gibbs* v. *Fremont* (3).

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the English liquidator:—

No doubt the Australian law applies, but the case is governed by the South Australian *Bills of Exchange Act*, 1884. Under

(1) 33 Ch. D. 178.
(2) 6 Moo. P. C. 314, 321.
(3) 9 Ex. 25.

sect. 57 (1) of that Act, in the case of a bill dishonoured abroad the holder is entitled to recover re-exchange from the drawer, but not interest. The present claim is not for re-exchange, and it is misconceived. *Ex parte Robarts* (2) shews that this is the true construction of the Act. Sect. 57 of the Colonial Act is identical with sect. 57 of the English *Bills of Exchange Act*, 1882, except that in the former words fixing the rate of interest at 10 per cent. are introduced in clause (*b*.) of sub-sect. 1.

This so-called bill of exchange is really a promissory note, the same company being both drawers and acceptors, and the breach of contract took place in *London*, where the acceptance was refused and the bill dishonoured.

The claimants have elected to prove in *England*, and cannot stand in a better position than the other creditors who have proved here.

Pollard, appeared for the Colonial liquidators.

THE COURT declined to hear him.

Theobald, in reply.

(1) The South Australian Act (47 & 48 Vict., No. 312), s. 57, provides: "Where a bill is dishonoured the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

"(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

"(*a*.) The amount of the bill;

"(*b*.) Interest thereon *at the rate of ten pounds per centum per annum* from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;

"(*c*.) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest."

"(2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him the amount of the re-exchange, with interest thereon until the time of payment."

This section is identical with sect. 57 of the English *Bills of Exchange Act*, 1882 (45 & 46 Vict. c, 61), except that the words in sub-sect. 1 (*b*) which are above printed in italics are not in the English Act.

(2) 18 Q. B. D. 286.

Aug. 3. NORTH, J. (after stating the facts, continued):—

The question is whether the claimants are entitled to be allowed additional interest at 5 per cent., so as to make up 10 per cent. in the whole. It was contended that the bill, being drawn by the company in *Australia* upon its *London* branch, was really drawn by the company upon itself; that it was, therefore, in the nature of a promissory-note; and that the mercantile law applicable to bills of exchange does not apply. But in *Willans* v. *Ayers* (1) it was decided that it did not lie in the mouth of the drawer or acceptor of such a bill to raise that objection, and that, if the holder chose to treat the document as a bill of exchange, he was entitled to do so. It comes, therefore, to this, that the holders of this bill, who are, no doubt, indorsees of the drawers, have entered into a contract with the drawers, and the drawers with them, that the bill shall be presented for acceptance at the branch of the bank in *London* on which it is drawn, that it shall be accepted when presented, and that it shall be paid at maturity. In consequence of the stoppage of the bank before the bill was presented, it was not accepted, and there has been a breach of contract on the part of the drawers towards the holders, and the drawers are liable to the holders in damages for that breach.

The question is, what those damages are? In some cases, no doubt, it has been held that the holder of a bill may recover as damages interest at the rate payable in the country in which the contract was made the breach of which gives rise to the claim. *Allen* v. *Kemble* (2) and *Gibbs* v. *Fremont* (3) were cited as authorities for the proposition that interest is payable. In *Gibbs* v. *Fremont*, Mr. *Willes*, whose argument was successful, cited the following passage from *Story* on the Conflict of Laws: "The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and in default of such payment they agree, upon due notice, to reimburse the holder in principal and damages at the place where they respectively entered into the contract." That place, in the present case, was *South Australia*. Then Baron *Martin*, in the course of the argument, referred to *Allen* v. *Kemble* (1), and read this passage from it: "There it is said, 'The drawer, by his contract, undertakes that the drawee shall accept, and shall afterwards pay the bill, according to its tenor, at the place and domicil of the drawee, if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicil of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with such interest, damages, and costs as the law of the country where he contracted may allow.'" Baron *Alderson* delivered the judgment of the Court, and treated the point as expressly decided in *Allen* v. *Kemble*. He said (2), "And this is not to be left to the jury, for it depends on the rule of law. The amount of the interest in each place is to be so left" (that is, to be left to the jury), "and so also is the question whether any damage has been sustained requiring the payment of interest at all, for those are questions of fact." Then he proceeded to deal with the case on the footing that those questions had been before the jury, and that they had found what the facts were. Those cases, therefore, shew clearly that the liability to damages is to be measured according to the law of the country where the contract which is broken was entered into.

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(1) 3 App. Cas. 133. (2) 6 Moo. P. C. 314. (3) 9 Ex. 25, 29.

In the present case there can be no doubt about the law of the country, because the South Australian Act relating to bills of exchange has been put in evidence, and it is substantially the same as the English Act of 1882 on the same subject. The 57th section, which bears on this point, corresponds exactly with sect. 57 of the English Act, except that, instead of giving interest generally, it gives interest at the rate of 10 per cent., no doubt because that is the ordinary rate of interest in *Australia*. [His Lordship read sect. 57 of the Australian Act, and continued:—] I was inclined at one time to think that the remedy given by sub-sect. 2 in the case of a bill dishonoured abroad was an alternative remedy, and that the holder had an option of proceeding either under sub-sect. 1 or under sub-sect. 2. But on consideration I do not think that is the real meaning. Sub-sect. 1 is not in terms limited to the case of a bill dishonoured at home, but still I think the true construction is that, when the bill is dishonoured abroad, the damages mentioned in sub-sect. 2 are the only damages which can be recovered.

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(1) 6 Moo. P. C. 314.

(2) 9 Ex. 31.

There is very excellent authority to assist me on this point in the case of *Ex parte Robarts* (1), in which the construction of sect. 57 of the English Act came in question. There Lord Justice *Lindley*, who delivered the judgment of the Court, in speaking of the consequences of the breach of contract arising from the non-payment of a bill of exchange, said (2): "These consequences are dealt with in sect. 57. Sub-sect. 1 deals with bills dishonoured at home, and sub-sect. 2 deals with bills dishonoured abroad. The bills now in question were drawn abroad, but they were payable, and accepted, and dishonoured in this country, and therefore, if provided for at all, they fall within sub-sect. 1 and not sub-sect. 2. But, according to sub-sect. 1, neither the acceptor, nor anyone else, is liable to pay more than the amount of the bill and interest, and expenses of noting and protest. But this sub-section does not appear to be addressed to the case of a bill the drawer of which is liable to damages for re-exchange." That, therefore, is a decision on sect. 57 of the English Act, which is identical with that with which I have now to deal, that, in the case of a bill dishonoured abroad—that is, in a place foreign to that where it is drawn and indorsed—the remedy is under sub-sect. 2 for re-exchange. That sub-section in each of the Acts is founded, not upon anything peculiar to the law either of *England* or of *Australia*, but upon the general law of merchants, and is of international application. It is clear that this is so as regards *England*. For this I may refer to *De Tastet* v. *Baring* (3) and *Suse* v. *Pompe* (4). The law of *England* is fully stated in *Chitty* on Bills and in *Byles* on Bills. As regards continental nations the law is stated in *Pothier*, and as regards *America* in *Kent's* Commentaries and *Story* on Bills, and many other text-books. It seems to me, therefore, that this claim for interest is wrong.

(1) 18 Q. B. D. 286.
(2) Ibid. 292.
(3) 11 East, 265.
(4) 8 C. B. (N.S.) 538.

The way in which the re-exchange is reckoned is pointed out very clearly in *Chitty* on Bills (1) thus: "In foreign countries, especially in *France*, when a bill has been duly protested for non-payment, the holder has a right to reimburse himself by drawing a second bill of exchange (called by the French *retraite*) on the drawer or one of the indorsers of the first, for an amount which is composed, first, of the principal sum and interest from the day of the protest; secondly, of the expenses of the protest; thirdly, of other legal expenses, such as bank commission or brokerage, and of journeys, when requisite, to obtain payment; and, fourthly, of the stamp and of the postage of letters, which the default of payment rendered it necessary to write. These charges must not exceed what ought of right to be demanded, and the vouchers for such charges should accompany the bill. The evidence in support of the charges is established by an account called *compte de retour*, which ought to be annexed to the *retraite*, together with the protest, or a copy thereof. This account ought to name the person on whom the *retraite* is drawn, in order to shew that it relates to such bill, and to avoid the frauds that might result from the omission. The account ought also to announce the rate of exchange at which the *retraite* is negociable, and which the law terms re-exchange." That shews clearly the details to be gone through in order to arrive at the amount payable by way of re-exchange. But it is clearly not necessary that all those processes should be strictly followed, for, as is said in *Byles* on Bills (2): "According to English practice, the *retraite* or re-exchange bill is now seldom drawn, but the right of the holder to draw it is settled by the law merchant of all nations, and it is only by a reference to this supposed bill that the re-exchange, in other words, the true damages in an action on the original bill, can be scientifically understood and computed." That shews that it is immaterial that in the present case the bill has not been sent out to *Australia*. The amount of damages for re-exchange can be ascertained without that formality being gone through. It is clear, therefore, that the amount payable by way of re-exchange depends upon various complicated matters, such as the expenses incurred in the particular case, and the rate of exchange at the moment between the two countries which are concerned in the transaction. Therefore it is impossible to say what is the precise sum payable, except by going through the computation in the particular case.

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(1) 10th Ed. p. 337.

(2) 14th Ed. p. 449.

In some countries a different rule has been adopted in order to avoid the trouble of this computation. For instance, it appears from *Francis* v. *Rucker* (1) that a liquidated sum of 20 per cent. was substituted for re-exchange in the state of *Pennsylvania,* and from *Ex parte Robarts* (2) it appears that in *Tobago* a liquidated sum of 10 per cent. has been substituted for re-exchange. I have considered whether it would be possible to treat the 10 per cent. in the present case as really a liquidated sum in lieu of re-exchange. But there are difficulties about that, particularly having regard to *Willans* v. *Ayers* (3). In that case *South Australia* was the foreign country, and an attempt was made to prove that there was a custom existing there for 10 per cent. to be taken as liquidated damages instead of re-exchange, but the Privy Council held that the custom was not proved, and refused to act upon it. The claimants are also in this difficulty, that they are not claiming upon the footing of a breach of the contract, but they have proved for the amount of the bill with interest, and, interest having been allowed at 5 per cent. (that being the rate of interest payable upon bills of exchange in this country when the rate is not specially agreed upon), they have accepted interest at that rate, and they now make a claim, not for damages, but for additional interest as on a contract which they affirm, and not one for the breach of which they are suing. I feel therefore an insuperable difficulty in attempting to remould the claim, or in allowing an amendment, so as to make it a claim for re-exchange instead of interest, as I have no means of ascertaining what the amount of the re-exchange would be, or of forming any opinion whether the case is similar to *Willans* v. *Ayers,* and whether any sum would be payable for re-exchange.

I think the claim for interest is altogether misconceived, and I

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(1) Amb. 671.

(2) 18 Q. B. D. 286.

(3) 3 App. Cas. 133.

NORTH, J.
1887
In re COMMERCIAL BANK OF SOUTH AUSTRALIA.

have no materials which enable me to substitute any other claim for it. The claim fails, and I must dismiss it with costs.

Solicitors for Claimants: *Donnithorne & Ewer.*
Solicitor for English Liquidator: *Edwin Andrew.*
Solicitors for Australian Liquidators: *Hancock, Sharp & Hales.*

W. L. C.

NORTH, J.
1887
Aug. 9.

LITCHFIELD *v.* JONES.

[1882 L. 3430.]

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-ss.* 3, 4 [*Revised Ed. Statutes, vol. xvi., p.* 112]—*Solicitor—Town Agent—Fiduciary Capacity.*

A solicitor, the *London* agent of a country solicitor, made default in payment of a sum ordered to be paid by him in an action for an account of his agency:—

Per North, J.:—The Defendant was liable to imprisonment under sect. 4, sub-sect. 3, of the *Debtors Act*, 1869, as a person acting in a fiduciary capacity, but not liable under sect. 4, sub-sect. 4, as a solicitor ordered to pay in his capacity of officer of the Court.

THIS was an action by the executrix of a country solicitor against his town agent, *Richard Jones*, a solicitor, for an account of his agency.

On the 14th of July, 1887, an order was made that the Defendant should pay into Court within seven days, as directed in the schedule to the order, a sum of £3022 13*s.* 1*d.*, and should pay to the Plaintiff the costs of the action subsequent to judgment.

A motion was now made on behalf of the Plaintiff to commit the Defendant for default in disobeying the order to pay into Court the sum of £3022 13*s.* 1*d.*, and for the appointment of a receiver of the rents and profits and outstanding debts and other assets of the Defendant. The appointment of a receiver was not resisted.

Cookson, Q.C., and *Woodfall*, for the Plaintiff:—

The Defendant is liable to imprisonment notwithstanding the abolition of imprisonment for debt by the 4th section of the *Debtors Act*, 1869, inasmuch as he comes within the exception contained in sub-sect. 3 of that section, because he acted in a fiduciary capacity as agent; and also comes within the exception contained in sub-sect. 4, because he was ordered to pay in his capacity of officer of the Court: it is true the country solicitor was not his client, yet it was his position as a solicitor and officer of the Court that induced the agency.

T. L. Wilkinson, for the Defendant:—

The relationship of solicitor and client does not exist between a town agent and a country solicitor: *Ward* v. *Eyre* (1); in fact the agency work can be done by a person who is not a solicitor. The work of the agent is not therefore done by him in his capacity of an officer of the Court. Nor can the agent be properly said to be acting in a fiduciary capacity, his duties are similar to those of a banker, who is a mere debtor. The distinction between agents in a fiduciary position and other agents appears from the case of *Crowther* v. *Elgood* (2).

Cookson, in reply.

NORTH, J.:—

In respect to the application to commit I am not disposed to accede to it for the reason that I do not see what good could be got by an order to commit. There is evidence that the Defendant has no money, and the Plaintiff is seeking to attach his property, and I do not see that he has anything more. I think there is jurisdiction to do more. I think the circumstances are such that the Defendant does come within sub-sect. 3 of sect. 4 of the *Debtors Act*. In my opinion he is a person acting in a fiduciary capacity, and in point of fact I have in this case expressed that view when I ordered him to pay interest. Whether he comes under the 4th sub-section I feel a good deal more doubt, because he is not brought here in his capacity of a solicitor. It is quite true he would never have been selected to act as agent if he had not been a solicitor, but that seems to me to be a very different

(1) 15 Ch. D. 130.

(2) 34 Ch. D. 691.

thing from his acting in the capacity of solicitor. If the Legislature had intended that the mere fact of his being a solicitor should be sufficient to expose him to the penalty of imprisonment it would have said so.

Solicitors: *G. H. Carthew*, agent for *William Turner, Newcastle-under-Lyme; R. B. Jones.*

D. P.

NORTH, J.
1887
June 13, 14, 15.

In re CUNNINGHAM & CO., LIMITED.

SIMPSON'S CLAIM.

Principal and Agent—Authority of Agent—Manager of Trading Company abroad—Promissory Note purporting to be signed on behalf of Company.

The business of a company was that of importers and dealers in tinned ox-tongues and other provisions. *Hunter* was appointed manager of the company's business in *South America*, "to take the entire charge of the interests of the company there." No express authority was conferred on him to sign or accept bills or promissory notes on behalf of the company. He was desirous of entering into a contract with one *Liberos* for the supply of ox-tongues to the company in *South America*. *Liberos* refused to enter into a contract unless a guarantee was given by some third person, and, at the request of *Hunter*, *J. C. Simpson* agreed to give the required guarantee, which he did by depositing £1000 in a bank to the order of *Liberos*. As a counter-security to *Simpson*, *Hunter* gave him a promissory note for £1000, signed by him "in representation of" the company. The company made default in carrying out the provisions of the contract with *Liberos*, and, under a power contained in it, he forfeited the deposit, which was paid over to him by the bank. No goods were supplied to the company under the contract. The company never recognised the promissory note, and it was dishonoured at maturity. The company being in liquidation, *Simpson* claimed to prove in the winding-up upon the note:—

Held, that, it not being shewn that the giving of the note was necessary for the carrying on of the business of the company, or that it was in the ordinary course of the business of such a company, the note was not binding upon the company, and the claim in respect of it could not be admitted.

THIS was a claim by Mr. *J. C. Simpson* to prove in the winding-up of the above company in respect of a promissory note for $5000, which purported to have been signed on behalf of the company by Mr. *C. H. D. Hunter*, who was the manager of the company in *South America*. *Simpson* claimed a sum of £864 5*s*. 3*d*. as remaining due to him in respect of the note.

The main question was whether *Hunter* had authority to bind the company by the note.

The objects for which the company was formed were (*inter alia*) "to purchase and acquire from Mr. *R. N. Cunningham* the goodwill of the business of an importer and dealer in tinned ox-tongues and other tinned provisions carried on by him under the style of *R. N. Cunningham & Co.*, together with the trade-mark or brand under which his goods are sold, and known as the '*Napier*' brand, the leasehold property, plant, machinery, live and dead stock, chattels and effects belonging to the said *R. N. Cunningham*, and used in connection with the said business, and the benefit of existing contracts"; "to continue, establish, and carry on the business of preservers and importers of and dealers in tinned ox tongues and other provisions," and "to borrow money on mortgage, debentures, bonds, uncalled capital or other securities, or on the credit of the company, and to execute bills of exchange, promissory notes, and other negotiable instruments." *Hunter* and *Cunningham* were both shareholders in the company, and were both appointed directors by the articles of association, *Cunningham* being the managing director.

The company was registered in May, 1882. On the 10th of July, 1882, a deed was executed, by which the company agreed to take *Hunter* into their employ as manager of their trade or business of meat preservers in *South America*, for a term of three years from the date thereof (subject to a power of dismissal thereinafter contained) upon (*inter alia*) the following terms and conditions: (1) that *Hunter* would thenceforth become and continue to be solely in the employ of the company as their manager in *South America;* (2) that he would immediately upon being required so to do superintend the purchase of all plant and machinery required to be purchased in *England* for use in the preserving of tongues and meat in *South America ;* (3) that he would when so required proceed at once to *Buenos Ayres*, "there to take the entire charge of the interests of the company, and then and there faithfully carry out the written instructions which shall have been given to him, or which may in the future from time to time be given to him, by the board of directors in *England* of the company for his better guidance and direction in the management of the business and in furthering the company's interests."

This deed did not confer on *Hunter* any express authority to sign or accept bills or promissory notes on behalf of the company, nor was any such authority expressly conferred by the articles of association of the company.

Hunter sailed for *South America* in October, 1882, accompanied by *Cunningham*, and they arrived there early in November. The company had at that time agreed to purchase a meat preserving business which had been carried on by a firm of *Stevenson & Co.* at *Paysandu* in *South America.*

The promissory note on which the claim of *Simpson* was founded was in the Spanish language, and was to the following effect:—

"*Buenos Ayres*, 20th Dec., 1882.

"At two months from date we will pay to the order of Mr. *James Carrington Simpson* the sum of five thousand hard dollars in gold for like value received.

"$5000.

"For myself, and in representation of
R. N. Cunningham & Co. (*Limited*),
"(Signed) *C. H. D. Hunter.*"

The company refused to recognise this note, and it was dishonoured at maturity. The circumstances under which the note was given were thus stated in an affidavit made by *Simpson* :—

"In November, 1882, on board the steamship *Galileo* bound for *Monte Video*, I met *Cunningham* and *Hunter*, who informed me that *Cunningham* was the managing director, and *Hunter* a director, of *R. N. Cunningham & Co., Limited*, and that the latter was proceeding to *South America* as manager of the company. At the same time they shewed me a prospectus of the company. *Cunningham* and *Hunter* landed at *Monte Video*, and I proceeded to *Buenos Ayres.* About a fortnight after I met them in *Buenos Ayres*, when they further spoke to me with reference to the company, and informed me that they were proceeding to arrange for contracts for meat for the purposes of the company and for developing its business in *South America.* *Hunter* subsequently informed me that, as manager of the company, he had arranged for a contract with a Mr. *Liberos* for a supply of meat to the company, but that, before the contract could be signed, as *Hunter* was a stranger, *Liberos* required some person to guarantee that the contract would be carried out. Mr. *R. J. Nield*, my agent in *Buenos Ayres*, informed me that *Hunter* produced to him an agreement made between *Hunter* and the company, which my agent advised me gave *Hunter* sufficient power to enter into such contract and to obtain a guarantee, and I believe that *Hunter* was duly authorized to make such contract and obtain from me the guarantee. I, at the request of *Hunter*, guaranteed the fulfilment of the contract by *Hunter*, as manager and agent of the company, to the extent of $5000, by placing the sum of $5000 in the *London and River Plate Bank* to the order of *Liberos*, as a guarantee for the fulfilment of such contract, and thereupon the contract was, as I am informed and believe, entered into between *Hunter* as agent for the company and *Liberos.* On the 20th of December, 1882, as security to myself, *Hunter* drew and handed to me a bill or promise to pay for the amount of $5000 payable at two months, and the same was signed by him for himself and as the representative of the company. At the time of signing such promise to pay *Hunter* represented to me, and I believe it to be the fact, that he had full power by such signature to bind the company."

Simpson also stated that, by way of security for the bill, *Hunter* on the 20th of December, 1882, wrote a letter to him, by which he assigned to him all his interest in the company, whether as a shareholder, salaried manager, or otherwise, and on the 29th of January, 1883, *Hunter* gave him, as a further security for the payment of the note, a letter addressed to Messrs. *Michaelson*, of *Monte Video*, asking them to place at *Simpson's* disposal the stock of tin-plates and solder which they held belonging to the company, and authorized *Simpson* to sell those articles.

Nield also made an affidavit in which he gave substantially the same account of the transaction.

The prospectus of the company gave the name of *Hunter* as one of the directors of the company, and stated that "Mr. *Hunter* has had several years practical experience in the tinning of meats, tongues, &c., and came to *Europe* to establish a preserving and tinning company, bringing with him engagements for a considerable amount of capital to be subscribed to that enterprise in *Buenos Ayres.* The directors have arranged to amalgamate their interests with those of this company. The actual details being familiar to Mr. *Hunter*, he has undertaken the supervision of the business in *South America.*"

The contract entered into between *Hunter*, on behalf of the company, with *Liberos* empowered the latter to forfeit the deposit of $5000, in case the company should make default in carrying out the terms of the contract. The company did make default, and *Liberos* forfeited the deposit, which was paid out to him by the bank. The company never obtained any goods from *Liberos* under the contract. There was evidence to the effect that *Liberos* was almost the only person in *Buenos Ayres* with whom a contract for the supply of tongues to the company could be entered into. *Simpson* had obtained part payment of the note by means of the other security which *Hunter* gave him.

Napier Higgins, Q.C., and *Lemon*, for the claimant :—

By virtue of *Hunter's* position as manager of the company in *South America* it was competent to him to enter into the contract for the guarantee, and to bind the company by the promissory note which he gave to *Simpson* as a counter-security. The authority which is generally incident to the position of an agent cannot be restricted as regards the public by any private communication between him and his principal, which is not made known to the persons with whom he deals. A representation was made to the claimant, by means of the prospectus, which was shewn to him, and otherwise, that *Hunter* had the general supervision of the company's business in *South America*, and that he was entitled to do whatever was necessary for that purpose. He had authority to contract for a supply of tongues, and *Liberos* was practically the only man with whom he could make a contract, and, as *Liberos* would not enter into a contract without a guarantee, *Hunter* had authority to do whatever was necessary in order to obtain the guarantee.

NORTH, J.
1887
In re CUNNINGHAM & Co., LIMITED. SIMPSON'S CLAIM.

In *Edmunds* v. *Bushell* (1) it was held that a principal, who had expressly forbidden his agent to draw or accept bills, was liable on a bill accepted by the agent. In *Smith* v. *M'Guire* (2) a principal was held liable upon the contract of his general agent, although the agent had exceeded his authority. The company by their subsequent conduct have ratified the act of their agent and are estopped from denying his authority.

Cookson, Q.C., and *Seward Brice*, Q.C., for the official liquidator of the company:—

The question is whether the giving of this promissory note was necessarily incident to the office of manager. The evidence does not shew that no one would have entered into a contract to supply ox-tongues to the company without such a guarantee, nor does it shew that the giving of the guarantee was in accordance with a local trade usage or course of business. There is no evidence that the company obtained any goods from *Liberos*. The £1000 simply went into his pocket. In the absence of local usage or necessity the company cannot be bound by the note, unless they gave *Hunter* express authority to sign it. A local manager of the business of a company has no authority as such to borrow money on the credit of the company. In *Edmunds* v. *Bushell*, *Jones* had employed *Bushell* to manage his business, which was carried on under the name of *Bushell & Co.*, but had given him no authority to draw or accept bills. *Jones* was held liable upon a bill which *Bushell* had accepted in the name of *Bushell & Co.*, because he had held out *Bushell* as the owner of the business. In *Smith* v. *M'Guire* a particular course of business was proved. In *Hawtayne* v. *Bourne* (3) it was held that the resident agent of a mining company, who had been appointed by the directors to manage the mine, had not an implied authority from the shareholders to borrow money on their credit in order to pay arrears of wages due to the labourers in the mine who had obtained warrants of distress upon the materials belonging to the mine. In *Linford* v. *Provincial Horse and Cattle Insurance Company* (4) it was held that an ordinary local agent

(1) Law Rep. 1 Q. B. 97.
(2) 3 H. & N. 554.
(3) 7 M. & W. 595.
(4) 34 Beav. 291.

of an insurance company was not, without special authority, authorized to bind the company by a contract to grant a policy.

There has been no ratification or adoption of the note by the company. The company have derived no benefit whatever from the transaction.

Napier Higgins, in reply.

NORTH, J. (after stating the facts, continued):—

The contract with *Liberos* was one from which the company actually derived no benefit whatever, because it enabled him to forfeit, and he did forfeit, the deposit, and the company never received from him any goods in return for the $5000.

Then the question is whether *Hunter*, as manager of the company, appointed by the deed of the 10th of July, 1882, had authority to bind the company by signing the promissory note. I think the fact that *Hunter* was also a director is of no importance, for he had no authority as a single director to bind the company.

Now what is the authority of a general manager of a company to bind the company. The case principally relied upon by the liquidator was *Hawtayne* v. *Bourne* (1). The general principle of which that case is an illustration seems to me to be very correctly laid down in Lord Justice *Lindley's* book on Partnership (2). The learned author is speaking of the authority of one partner to bind another, an authority which depends on the doctrine of agency, and he refers to *Hawtayne* v. *Bourne* and says: "It will be observed, that what is necessary to carry on the partnership business in the ordinary way, is made the test of authority where no actual authority or ratification can be proved." (In the present case the deed appointing *Hunter* does not contain any express authority to enter into such a contract as this; his whole authority is derived from his position as the manager of the business). "This is conformable to the most recent and carefully considered decisions; but by adopting it the liability of a firm for the acts of its co-partners is not so extensive as non-lawyers sometimes imagine. The act of one partner to bind the firm must be necessary for the carrying on of its business; if all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners. Nor it seems will necessity itself be sufficient if it be an extraordinary necessity. What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test; and therefore, in a case where the nature of the business was one in which there was no necessity to borrow money to carry it on under ordinary circumstances and in the ordinary manner, the Court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin." (The case referred to is *Hawtayne* v. *Bourne* (1)). "This case is an authority for saying that a power to do what is usual does not include a power to do what is unusual, however urgent; and although in the case referred to, the money was not borrowed by a partner, but by a person who was only an agent of the firm, the decision would, it is apprehended, have been the same if he had been a partner. For notwithstanding the fact that every partner is to a certain extent a principal as well as an agent, the liability of his copartners for his acts can only be established on the ground of agency. As their agent he has no discretion except within the limits set by them to his authority, and the fact that he is himself, as one of the firm, a principal, does not warrant him in extending those limits, save on his own responsibility. The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible, and, as may readily be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for carrying on another, in the ordinary way."

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(1) 7 M. & W. 595.

(2) 4th Ed. vol. i. p. 238.

That passage seems to me to lay down the law applicable to the present case quite correctly, and, adopting the law as there laid down, the question is, had *Hunter* authority to do what he did? In the first place, was it necessary for the carrying on of the business of the company that this contract with *Liberos* should be entered into? There is no evidence to shew that it was necessary. All that appears is, that *Liberos* was almost the only person from whom goods could be obtained. Was the giving of the note usual in the ordinary course of the business of such a company? It certainly was not in the ordinary course of the business of this particular company, for it was a newly formed company, and had not yet any ordinary course of business. But it seems to me that such a transaction has never been held to be in the ordinary course of the business of any company whatever; it was a transaction wholly outside the ordinary business of the company. *Hunter* had authority to carry on the business there, and to obtain meat and tongues for the purpose of preserving. He had authority, I take it, to buy these things, and it may be that he had authority to pledge the credit of the company for such articles, though I am not sure that he had. But he was not obtaining a loan for the purpose of paying for goods supplied to the company; he was obtaining a guarantee in the shape of a deposit of a sum of money which was never received by the company at all. The money was not handed over to a person who had supplied goods, but it was placed to his credit at a bank before he had supplied any goods whatever, and it was forfeited by him because the company did not perform their part of the contract. Under these circumstances I think that the giving of the note was not only unnecessary, but that it was not in the ordinary course of the business of the company. It was an abnormal transaction altogether, and there was nothing in the position of *Hunter*, or in the nature of his employment, to justify his entering into the transaction, or to authorize him to bind the company by it.

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(1) 7 M. & W. 595.

[His Lordship then decided upon the evidence that there had been no ratification of the note by the company, and he disallowed the claim.]

Solicitors for *Simpson*: *G. F. Hudson, Matthews, & Co.*
Solicitor for liquidator: *G. Castle.*

W. L. C.

In re RICHARDS.
SHENSTONE *v.* BROCK.

[1882 R. 1193.]

NORTH, J.
1887
June 28.

Voluntary Gift—Completion—Creation of Trust by Donor—Delivery of Promissory Note to be handed over after Death of Testatrix to Third Person on her fulfilling a Condition.

A testatrix made her will in 1873, and thereby bequeathed a legacy of £150 to *E. H.*, who was living with her as a domestic servant. In August, 1877, the testatrix handed to *C.*, her solicitor (whom she had appointed one of her executors), a promissory note for £200, signed by herself and payable on demand to *E. H.*, telling *C.* not to mention the note to any one but *E. H.*, but to retain it till the death of the testatrix, and then to give it to *E. H.*, if she should remain in the service of the testatrix until her death. *E. H.* was informed of the note soon after it had been handed to *C.* The testatrix had previously told *E. H.* that, if she would continue in her service until her death, she would leave in the care of *C.* a present for her, beyond what she might leave to her in her will. *E. H.* remained in the service of the testatrix until the death of the latter, and the promissory note continued in the possession of *C.* The testatrix died in 1881. She had never revoked the direction which she had given to *C.* about the note:—

Held, that *C.* was constituted a trustee of the note, that he might after the death of the testatrix hand it over to *E. H.* if she had fulfilled the prescribed condition, and that, as the testatrix had never revoked the direction which she had given to *C.*, *E. H.* was entitled to prove for the amount of the note in the administration of the estate of the testatrix.

SUMMONS to vary the Chief Clerk's certificate.

The action was brought for the administration of the personal estate of *Louisa Richards*, spinster, who died on the 27th of July, 1881, having made her will on the 12th of February, 1873. The Plaintiffs, *William Shenstone* and *William Cottrell*, were the executors and trustees of the will. By the will the testatrix bequeathed (*inter alia*) a legacy of £150 to her servant *Ellen Harris*. After the death of the testatrix *Ellen Harris* married the Defendant *Robert R. Brock*. Mrs. *Brock* claimed to be a creditor of the testatrix for £200. The Chief Clerk disallowed the claim, and the present summons was taken out by Mr. and Mrs. *Brock* to vary the certificate by admitting the claim. The circumstances under which the claim arose were thus stated in an affidavit made by the Plaintiff *William Cottrell*:—

"In or about the month of August, 1877, the testatrix consulted me as to further benefiting *Ellen Harris* beyond what she had given her by her will, and ultimately handed me a promissory note signed by the testatrix, payable on demand to *Ellen Harris*, and desired me not to mention the promissory note to any one but *Ellen Harris*, but to retain it until the testatrix's death, and then to give it to *Ellen Harris*, if she should remain in her service until that event happened. I accordingly retained the promissory note, and the same has ever since the 11th of August, 1877, been in my possession."

Ellen Harris remained in the service of the testatrix until her death. She was informed of the deposit of the promissory note with *Cottrell*. She deposed that the testatrix had promised her that, if she would continue in her service until her death, she would leave in the care of *Cottrell* a present for her beyond what she might leave her in her will. The promissory note was in these terms:

"August 11, 1877.

"On demand I promise to pay to *Ellen Harris* the sum of two hundred pounds.

"(Signed) *Louisa Richards*."

Cookson, Q.C., and *S. B. L. Druce*, for the summons:—

There was a complete gift of the note to Mrs. *Brock*, or a declaration of trust of it in her favour, subject only to the condition that she should remain in the service of the testatrix until the death of the latter, and that condition was fulfilled. Consequently, Mrs. *Brock* is entitled to prove for the £200; *Lloyd* v. *Chune* (1); *Arthur* v. *Clarkson* (2). It is immaterial that the note was not delivered to Mrs. *Brock* herself, but was retained by the executor: *Hall* v. *Palmer* (3); *Bonfield* v. *Hassell* (4).

Giffard, Q.C., and *Bardswell*, for some of the residuary legatees:—

The gift of the note was voluntary, and it was incomplete; it was only intended to be made, not actually made, and the Court will not aid in perfecting an imperfect voluntary gift. Mr. *Cottrell* held the note as the agent of the testatrix, not of Mrs. *Brock*, and the testatrix could at any moment have required

(1) 2 Giff. 441.
(2) 35 Beav. 458.
(3) 3 Hare, 532.
(4) 32 Beav. 217.

him to deliver it back to her. The testatrix never parted with the control over the note; she never vested the property in it in the donee, or intended to do so. In *Hall* v. *Palmer* (1) the bond was made in favour of the plaintiff, and was delivered to her. In *Bonfield* v. *Hassell* (2) a deed had been executed by the donor. In order that there should be a good voluntary gift of a promissory note, either the property in it must have passed to the promissee by delivery of the note to him, or there must have been a declaration of trust in his favour. Delivery of the note to an intended donee—a person who is to become a donee at a future time—is not sufficient. The testatrix did not do all in her power to divest herself of the property in the note, and to vest it in the intended donee, or in a trustee for her: *Ellison* v. *Ellison* (3); *Warriner* v. *Rogers* (4); *Richards* v. *Delbridge* (5); *Milroy* v. *Lord* (6); *Heartley* v. *Nicholson* (7).

A promissory note differs from a covenant by deed or a bond. In those cases the covenantee or the obligee can sue upon the covenant or the obligation without the delivery of the instrument to him. In the case of a promissory note delivery of the note by the maker to the payee is essential to the right of the latter to sue on it; and the *Wills Act* prevents the note from operating after the death of the testatrix, it not having been delivered by her in her lifetime: *Gough* v. *Findon* (8).

Cottrell was never a trustee for Mrs. *Brock;* he was the agent of the testatrix.

Manby, for another residuary legatee:—

Gough v. *Findon* was recognised in *Hulse* v. *Hulse* (9).

Yate Lee; and *E. Ford;* for other residuary legatees.

Cozens-Hardy, Q.C., and *Phipson Beale*, for the Plaintiffs.

S. B. L. Druce, in reply:—

The testatrix did all that she could under the circumstances

(1) 3 Hare, 532.
(2) 32 Beav. 217.
(3) 6 Ves. 656.
(4) Law Rep. 16 Eq. 340.
(5) Law Rep. 18 Eq. 11.
(6) 4 D. F. & J. 264.
(7) Law Rep. 19 Eq. 233.
(8) 7 Ex. 48; 21 L. J. (Ex.) 58.
(9) 17 C. B. 711.

of the case to make the gift complete, her intention being that the money was not to be paid to the donee unless she remained in the service of the testatrix up to the time of her death. If the note had been made payable to *Cottrell*, and he had executed a declaration of trust of it for Mrs. *Brock*, he could have sued the testatrix upon it at once, and that is not what she intended. She intended that the donee should be able to sue upon the note after her death, not before. In *Hall* v. *Palmer* (1) and *Bonfield* v. *Hassell* (2) the testator retained the control of the documents until his death. Mrs. *Brock* was informed what the testatrix had done, and she performed the condition of the gift, so that she gave consideration for the note.

NORTH, J. (after stating the facts, continued):—

It has not been, and indeed it could not be disputed, that, if the testatrix had placed the sum of £200 in cash in the hands of Mr. *Cottrell*, for the purpose and with the directions mentioned by him in his affidavit, there would have been a good trust created in favour of Mrs. *Brock*. It is not necessary for the completion of a voluntary gift that the money should have been actually paid over in cash into the hands of the person who was intended to receive it; it is sufficient if there was either a complete transfer of the property in the note or a declaration of trust of it. The testatrix might have made a declaration of trust, making herself trustee. It was equally competent to her to make a third person a trustee for the purpose. It appears to me that the note was handed to Mr. *Cottrell* for the purpose and with the intention expressed by the testatrix at the time when it was given, which intention was never altered down to the time of her death, and that enough was done to constitute him a trustee of the note for Mrs. *Brock*, in case she should fulfil the prescribed condition. If the note had been made payable to Mr. *Cottrell* himself, he would have been able to sue the testatrix upon it immediately, which was not what she intended. It appears to me that the note was placed by the testatrix in his hands as a trustee, in order that he might hand it over to Mrs. *Brock* upon the happening of the particular event mentioned by the testatrix. It is not necessary to consider what the power of the testatrix

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(1) 3 Hare, 532.

(2) 32 Beav. 217.

NORTH, J.
1887
In re RICHARDS.
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might have been in the meantime, if she had changed her mind, because she did not do so. I allow the claim, with interest from the death of the testatrix and costs.

Solicitors: *Gamlen & Co.*, agents for *Cottrell & Son, Birmingham; Letts Brothers*, agents for *J. H. Baker, Birmingham; Venn & Co.; Lane, Fagge, & Andrews.*

W. L. C.

ASHWORTH *v.* LORD.

[1877 A. 10.]

NORTH, J.
1887
June 30; *July* 2.

Mortgagor and Mortgagee—Redemption Action—Mortgagee in Possession overpaid—Annual Rests—Costs.

In a redemption action against mortgagees in possession the Plaintiffs, who claimed to represent the original mortgagor, alleged that the Defendants had been overpaid. The Defendants by their statement of defence denied the title of the Plaintiffs to redeem; pleaded the *Statute of Limitations*; and asserted that a large amount was still due to them. At the trial the Plaintiffs' title to redeem was not disputed, and the defence of the statute was overruled.

The judgment directed the taking of the ordinary accounts in a redemption action against mortgagees in possession, including an account of what was due to the Defendants for principal and interest, and their taxed costs of the action; and that, on payment by the Plaintiffs within six months after the certificate of the balance (if any) which should be found due to the Defendants, the Defendants should reconvey the mortgaged property to the Plaintiffs, and that, in default of payment, the action should be dismissed with costs. But, in case it should appear on taking the accounts that the Defendants had been overpaid, the further consideration of the action was to be adjourned. The Chief Clerk found by his certificate that the mortgagees went into possession in May, 1857; that the mortgage debt was fully repaid in November, 1866; and that at the date of the certificate there was a balance of £618 due from the Defendants:—

Held, that the account must be taken against the Defendants with annual rests from the date at which the mortgage debt was fully paid:

Held, also, that the Defendants must pay the costs of the action.

Wilson v. *Metcalfe* (1) followed as to the annual rests, but distinguished as to the costs.

THIS was the further consideration of an action for the redemption of a mortgage, the Plaintiffs being persons who claimed, as representing the original mortgagor, to be beneficially interested in the equity of redemption of the mortgaged premises, which were copyhold.

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(1) 1 Russ. 530.

The mortgage was created by a surrender and deed of covenants, dated the 29th of June, 1819, by which *John Ashworth* surrendered the premises to *John Holt*, to secure the payment of £600 and interest; and on the 18th of April, 1820, *John Holt* was admitted, pursuant to the surrender. On the 1st of January, 1823, *John Ashworth* charged the property with the payment to *John Holt* of the further sum of £200. *John Ashworth* died in November, 1825. In 1827 *John Holt* died intestate, and on the 10th of March, 1827, administration to his estate was granted to his son *Richard Holt*, who was his heir-at-law, and his heir according to the custom of the manor of which the mortgaged premises were held, and also his sole next of kin. *Richard Holt* died in 1840, having devised his trust and mortgage estates to trustees, whom he also appointed his executors, and to whom administration *de bonis non* of *John Holt* was afterwards granted.

On the 27th of July, 1841, the trustees and executors of *Richard Holt* transferred the mortgage to *James Pickup*. In the year 1850 some portions of the mortgaged property were sold, and the proceeds of sale were applied in reduction of the mortgage debts. On the 10th of April, 1856, *Pickup* died, having by his will appointed *J. P. Lord*, *R. B. Dodgson*, and *Thomas Hart* trustees and executors thereof, to whom also he devised all estates vested in him as trustee or mortgagee. In May, 1857, the trustees of *Pickup's* will entered into the receipt of the rents and profits of the mortgaged property. *Thomas Hart* died in August, 1861, and *Lord* and *Dodgson* remained in receipt of the rents until the writ in this action was issued on the 23rd of December, 1876.

By their statement of claim, delivered on the 16th of March, 1877, the Plaintiffs alleged that the title of the mortgagor had been acknowledged in writing by the trustees of the will of *Pickup* in December, 1857, and that the Defendants had received from the rents of the property more than was due to them under their mortgage. The Plaintiffs claimed an account of what was due to the Defendants upon the mortgage; an account of the rents and profits received by the Defendants as mortgagees in possession, and that the Plaintiffs might redeem the property on payment of what might appear to be due to the Defendants; that, in case the annual rents received by the Defendants should have exceeded the interest due upon the mortgages, annual rests might be made, and that what should be owing on account of rents and profits might be applied first in payment of the interest of the mortgage securities, and then in sinking the principal; and that, in case it should appear that the Defendants had been overpaid their principal, interest, and costs, the Defendants might be ordered to pay the balance to the Plaintiffs, with interest.

On the 6th of June, 1877 (*Lord* having meanwhile died), *Dodgson* delivered a statement of defence, by which (*inter alia*) he relied on the *Statute of Limitations* (3 & 4 Will. 4, c. 27). He alleged that *Pickup* was entitled to a lien or charge on the mortgaged premises in respect of two bond debts of £100 and £200; and he denied that any balance was due to the Plaintiffs, and claimed that a large balance was due to himself. At the trial, on the 5th of July, 1878, the Plaintiffs' title to redeem was not disputed, and the Court overruled the defence of the statute. By the judgment it was ordered that the ordinary accounts in a redemption action against mortgagees in possession should be taken, including an account of what was due to the Defendant for principal and interest in respect of his mortgage securities, and for his costs of the action, to be taxed in case the parties should differ. An inquiry was also directed whether anything, and what, was due to the Defendant *Dodgson*, and from whom, in respect of the two bond debts. And it was ordered that, on the Plaintiffs paying to the Defendant *Dodgson* the balance (if any) found due to him, within six months after the date of the certificate, the Defendant should re-surrender the mortgaged premises to the Plaintiffs, and that in default of payment the action should be dismissed with costs. But, in case it should appear on taking the accounts, that the Defendant had been overpaid, the further consideration of the action was to be adjourned. On the 13th of June, 1882, the Defendant *Dodgson* died, and on the 11th of November, 1882, an order of revivor was made against *Jane Dodgson*, his widow, who was his sole executrix. She died on the

20th of January, 1884; and on the 19th of December, 1884, an order of revivor was made against her executors, *Ainsworth* and *Whalley*. On the 28th of February, 1887, the Chief Clerk made his certificate, by which he found that there was not any sum due for principal and interest to the late Defendant *Dodgson* or to the Defendants *Ainsworth* and *Whalley*, as the legal personal representatives of the late Defendant *Jane Dodgson*, widow, the sole executrix of the late Defendant *Dodgson* in respect of the mortgage securities. The Chief Clerk also certified that all sums secured by the mortgages were repaid to *Dodgson* and *Lord* in November, 1866, and that on the 30th of November, 1866, there was a balance of £11 12*s.* 7*d.* due from them; that at the date of the issue of the writ there was due from them the sum of £325 8*s.* 3*d.*, and that at the date of the certificate there was due from the Defendants *Ainsworth* and *Whalley* the sum of £618 2*s.* 8*d.*; that *Dodgson*, *Hart*, and *Lord* entered into receipt of the rents and profits of the mortgaged premises in the month of May, 1857; and that of the sum of £618 2*s.* 8*d.*, £462 8*s.* 2*d.* was due from the Defendants *Ainsworth* and *Whalley*, as the representatives of the late Defendant *R. B. Dodgson;* £44 9*s.* 4*d.* as the representatives of the late Defendant *Jane Dodgson;* and the residue, £111 5*s.* 2*d.*, from themselves.

Cozens-Hardy, Q.C., and *E. S. Ford*, for the Plaintiffs:—

The Plaintiffs are entitled to repayment of all over-payments, with interest calculated with annual rests from the time when the mortgage debt was paid off: *Wilson* v. *Metcalfe* (1). We do not ask for more than 4 per cent. interest, though interest on the mortgage debt was at the rate of 5 per cent.

The Defendants ought also to pay the costs of the action, inasmuch as a hostile defence was raised: *Barlow* v. *Gains* (2); *National Bank of Australasia* v. *United Hand in Hand and Band of Hope Company* (3).

Everitt, Q.C., and *Ingle Joyce*, for the Defendants:—

As to costs, we are the executors of an executor of a defendant

(1) 1 Russ. 530.
(2) 23 Beav. 244.
(3) 4 App. Cas. 391.

executor. There was a *bonâ fide* question raised, and the Defendants, who are mortgagees, ought not to be visited with costs. Even if costs are given against their estate the Defendants ought not to be made personally liable: *Boynton* v. *Boynton* (1); *Williams* on Executors (2). An executor can have no personal knowledge of what his testator has received.

The form of the judgment—directing an account of what was due to the Defendant *Dodgson* for his taxed costs of the action—precludes the Court from now ordering the present Defendants to pay the costs of the action: *Wilson* v. *Metcalfe* (3). This decision has been often followed.

As to the claim for annual rests, the judgment at the trial contains no direction that they shall be made, and it appears from the certificate that the mortgagees were not paid off for some years after they entered into possession. The Plaintiffs are bound by the form of the certificate, which finds that a specified balance was due on a certain day. The Court will not go behind that finding. At any rate annual rests should not be ordered since the date of the judgment.

Cozens-Hardy, in reply:—

The Defendants ought to pay the costs of the action. The Defendant *Dodgson* from the first wrongly resisted the claim of the Plaintiffs, and the present Defendants have adopted his defence.

North, J. (after stating the nature of the action and the judgment at the trial, continued):—

By their statement of defence the Defendants alleged that a considerable sum was then due to them, including large sums for principal and interest in respect of two bond debts of £200 and £100, as well as on the original advance, and they also disputed the title of the Plaintiffs to redeem, and moreover asserted that, by virtue of the *Statute of Limitations*, they (the Defendants) had become the absolute owners of the property. Before the trial they had been satisfied of the Plaintiffs' title, and no expense was incurred in respect of that, but they still insisted that a large

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(1) 4 App. Cas. 733.

(2) 6th Ed. vol. ii. p. 1828.

(3) 1 Russ. 530, 536.

NORTH, J.
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sum was due to them under their mortgage, and they still insisted upon their claim in respect of the two bond debts, and they asked for an inquiry as to that, and hostile accounts were taken on the footing, from the Defendants' point of view, that a considerable amount was due to them. The result of the certificate is, to put it shortly, that there is not anything due in respect of principal or interest. On the 30th of November, 1866, the account of receipts and payments shewed that there was an ultimate balance of £11 12*s.* 7*d.* due from the then mortgagees. Between the 30th of November, 1866, and the 23rd of December, 1876, the date of the issue of the writ, further sums were received by the mortgagees, and on that date the balance due from them was £325 8*s.* 3*d.* That is a balance of rents and profits received by them on the one hand and of payments allowed to them on the other, not including any interest received on the other side. The account was carried on, and the Chief Clerk finds that, down to the date of the certificate, further sums have been received by the mortgagees, and that the total amount due from them at the date of the certificate was £618 2*s.* 8*d.*, and then he finds how much was due in the lifetime of *Dodgson*, the Defendant at the time of the judgment, how much was due from the representatives of Mrs. *Dodgson*, as his executrix, and how much was due from the present Defendants in respect of their receipts and payments from the time when their predecessor in title died. Of course this sum must be paid by the present Defendants, as representing the persons from whom it is found to have become due from time to time.

Then the question arises as to annual rests. The Plaintiffs ask for annual rests on the balances found due from the times at which those balances respectively became due. The form of the judgment shews that interest was in arrear at the time when the mortgagees (the predecessors of the present Defendants) entered into possession. Therefore, annual rests have not been made in the accounts directed by the judgment. But, in my opinion, that has no bearing on the question whether annual rests ought to be made against the Defendants from the subsequent date at which it has been shewn that the mortgage debt was fully paid. The principle on which annual rests are not ordered as against mortgagees in possession, whose interest was in arrear at the time when they entered into possession, is, that it cannot be considered that, in so doing, they elected to receive their capital by driblets. They are entitled, in the absence of any bargain to the contrary, to have their whole capital paid off at once, and the taking of possession is not evidence of such a bargain. But, after they have been paid in full, they are, as was pointed out by the Master of the Rolls in *Wilson* v. *Metcalfe* (1), persons who are, in receiving the rents after their debt has been fully paid, availing themselves of another man's money for their own use and benefit, and they ought to be charged with interest. In that case annual rests were directed to be made from the time at which the mortgage debt was fully paid, and that is what I have always understood to be the practice in the few cases in which the point has arisen. It seems to me that annual rests are in the present case a matter of course.

It is suggested that they ought not to be allowed since the date of the judgment. I cannot see any reason for that distinction. The same state of things continued, and the same principle applies. The mortgagees remained in possession of another man's property, claiming either that it was their own, or that they were retaining it in respect of their debt. That claim has failed, and I can draw no line in respect of annual rests at the date of the judgment.

With regard to the costs of the action, it was suggested that I cannot now order the mortgagees to pay costs, by reason of the decision in *Wilson* v. *Metcalfe*, which is said to have been followed in numerous cases. The present case does not appear to me to correspond with that. The point whether the costs should be paid by the mortgagee seems to me to have been reserved by the judgment, to be dealt with after it should have been ascertained whether his claim was well founded or not. It has turned out to be an unfounded claim, and it seems to me that under such circumstances the usual and proper order is, that a mortgagee who has remained in possession, claiming the mortgaged property as his own after he has been fully paid, must pay the costs of a redemption action.

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(1) 1 Russ. 530.

The Defendants' counsel endeavoured to draw a distinction between the costs before and the costs after the judgment, and at first I thought there was something in that distinction, because the costs before the judgment were incurred at the time when there was a hostile claim by the Defendants setting up the *Statute of Limitations.* Since the judgment the *Statute of Limitations* has been out of the case, but the Defendants have still insisted before the Chief Clerk that a large amount was due to them. That amount was disallowed, and again, after their accounts had been taken a surcharge was carried in against them which has to some extent succeeded.

Under these circumstances it seems to me that no ground has been shewn for relieving the Defendants from the payment of any part of the costs of the action. I was disposed at one time to think that, as so long a period as ten years had been allowed to elapse between the date of the judgment and the completion of the accounts, and during that interval several changes of interest had taken place, this might have affected the costs to some extent in favour of the Defendants. But on looking at the dates I find that there has been great delay, which is not chiefly, if at all, attributable to the Plaintiffs, and I cannot on this ground relieve the Defendants from any part of the costs. The order for payment of costs by the Defendants will not prejudice any right which they may have in the administration of the estates of their own testator and testatrix to have those costs allowed to them, but, as between the Plaintiffs and the Defendants, the order must be for payment of the costs by the Defendants.

MINUTE OF ORDER:—Order that annual rests be made in the accounts of the rents and profits of the mortgaged property certified to have been received by the late Defendants, *Dodgson* and *Lord*, and the late Defendant *Jane Dodgson*, and the Defendants *Ainsworth* and *Whalley*, from the 30th of November, 1866, the time when from the certificate it appears that *Dodgson, Hart* and *Pickup* were overpaid their principal, interest, and costs, up to the date of payment, and that interest be computed on the respective balances in each year, at the rate of £4 per cent. per annum, and in taking such annual rests (except the first) the interest of each preceding balance is to be included in such balance, so as to charge the Defendants with compound interest thereon. And it appearing (from an affidavit filed on the 29th of July, 1887) that the total amount due on the account, when such annual rests have been made therein amounts to

£964 7*s.* 4*d.*, and that the portion thereof to be paid by the Defendants *Ainsworth* and *Whalley* as executors of *Dodgson*, for the period from the 30th of November, 1866 to the 13th of June, 1882, amounts to £777 17*s.* 1*d.*; that the portion to be paid by those Defendants as executors of *Jane Dodgson*, for the period from the 13th of June, 1882, to the 20th of January, 1884, amounts to £51 8*s.* 1*d.*, and that the portion to be paid by those Defendants personally, for the period from the 20th of January, 1884, up to the date of payment, amounts to £135 2*s.* 2*d.* Order the same Defendants as executors of *Dodgson* (they admitting assets) to pay the £777 17*s.* 1*d.* to the Plaintiffs, and as executors of *Jane Dodgson* (they admitting assets) to pay the £51 8*s.* 1*d.* to the Plaintiffs, and to pay to the Plaintiffs the £135 2*s.* 2*d.* due from the Defendants personally, the several payments to be made on or before the 1st of August, 1887, or subsequently within four days after the service of the order on the Defendants.

Solicitors for Plaintiffs: *Bolton, Robbins, Busk, & Co.*, agents for *Knowles & Thompson, Newchurch.*

Solicitors for Defendants: *Gregory, Rowcliffes, & Co.*, agents for *L. & W. Wilkinson, Blackburn.*

W. L. C.

Applied. Re HOWLETT (*decd.*). [1949]
2 All E.R. 490.

In re HOBBS.
HOBBS *v.* WADE.

[1885 H. 4660.]

NORTH, J.
1887
July 9, 11.

Statute of Limitations—Tenants in Common—Receipt of Rents by Father as Bailiff for Infant Son—3 & 4 Will. 4, *c.* 27, *s.* 12 [*Revised Ed. Statutes, vol. vii., p.* 390.]

A father was entitled in fee to an undivided moiety of gavelkind land, the other moiety of which belonged to his wife in fee. She died in May, 1870, leaving two sons, *Samuel* and *John*. *John* was then an infant. He attained twenty-one in 1877 and died in May, 1884. On the mother's death her moiety descended to her two sons in equal shares, as her co-heirs by the custom of gavelkind, but the father was by that custom entitled to a moiety of the rents of her moiety so long as he remained a widower. On the mother's death he entered into the receipt of the whole of the rents of her moiety, and continued in possession, without accounting to his sons or acknowledging their title in writing, for more than twelve years. On the death of *John* in 1884 his interest descended to his brother *Samuel* as heir of the mother. In February, 1884, the father had married a second wife, and in November, 1884, he died:—

Held, that, as to that one-eighth of the property to which *John* became entitled in possession on the death of his mother, the father must be taken to have entered into receipt of the rents as bailiff for his infant son, and that, consequently, the title of *John* was not barred by sect. 12 of the Act

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3 & 4 Will 4, c. 27, and that his brother *Samuel* was entitled to that one-eighth.

But *held*, that, as to *Samuel's* own one-eighth the same presumption did not arise, and that, there being no evidence that the father had received the rents as agent for *Samuel*, or had before the expiration of the statutory period acknowledged his title in writing, or accounted to him for the rents, the title of *Samuel* to that one-eighth was barred by the statute.

Consequently, *Samuel* was entitled to three-eighths of the whole property and the remaining five-eighths passed under the father's will.

SUMMONS to vary the Chief Clerk's certificate in this action, which was brought for the administration of the estate of *Samuel Hobbs*, who died on the 19th of November, 1884, having made a will.

In answer to the inquiries directed by the judgment at the trial of the action the Chief Clerk found that the testator's real estate at the time of his death consisted of (*inter alia*) "(1) an undivided moiety of about twenty-eight acres of freehold land of gavelkind tenure, called *The Salts*, situate at *Whitstable* in *Kent*; (5) one-fourth part of the land comprised in item (1) which is claimed by his son, *Samuel Hobbs* the younger."

Samuel Hobbs the younger sought to vary the certificate as regarded item No. 5.

The testator and his wife, *Sarah Ann Hobbs*, were entitled to the land called *The Salts* in equal undivided moieties, as tenants in common in fee. She died intestate on the 9th of May, 1870. She left two sons surviving her, viz., *Samuel Hobbs* the younger and *John Hobbs*. At the time of her death *Samuel* was more than twenty-one years of age, but *John* was an infant, he having been born on the 11th of October, 1856. By the custom of gavelkind the moiety to which the mother was entitled descended to her two sons as tenants in common in fee, in equal undivided moieties, subject to the right of her husband to receive a moiety of the rents of her moiety so long as he should remain a widower. Upon her death he entered into the receipt of the whole of the rents of her moiety, and continued in such possession until the 24th of June, 1884, without accounting to either of his sons. On the 29th of February, 1884, the testator married a second wife, and his right to receive a moiety of the rents of his first wife's moiety of the property thereupon ceased. In May,

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1884, the son *John* died intestate, and his interest in the property descended to his brother *Samuel*, as the heir, according to the custom of gavelkind, of the mother. There was no question as to the title of *Samuel*, the son, to that moiety of his mother's moiety of the property, the rents of which the testator was entitled to receive until his second marriage. The question was, whether the title of *Samuel*, the son, to the other moiety of his mother's moiety of the property, or any part thereof, was barred by the *Statute of Limitations*, by reason of his father's receipt of the rents for more than twelve years after the death of the mother. The testator had never during that period given any acknowledgment in writing of the title of either of his sons, or accounted to either of them for his share of the rents. There was evidence that in 1879 the testator had made, to a solicitor, who had been instructed by the son *John* to claim from his father the share of the rents to which he (*John*) was entitled since the death of his mother, verbal admissions of the right of his two sons respectively to one-half of their mother's moiety of the land. There was also evidence that in 1884, before his father's death, *Samuel* the son, had given notice to the tenant of the property not to pay the rent to any one but himself, and that, in consequence of this claim, the testator's solicitor by his directions had accounted to his son *Samuel* for the rent due in June, 1884, and had paid him a sum of £1 3*s.* 9*d.*, as being his one-fourth of the residue of the rent, after payment of the interest on a mortgage affecting the whole property. The solicitor at the same time retained a similar sum of £1 3*s.* 9*d*, as representing the one-fourth of the rent belonging to *John*, in part satisfaction of a charge which he had created in favour of the solicitor.

Mulligan, for the summons:—

As to the one-eighth to which *John* became entitled in possession on the death of his mother, he being then an infant, the father must be taken to have entered into the receipt of the rents as the son's bailiff, and the father's receipt of the rents in that character would not cease when the son attained twenty-one: *Thomas* v. *Thomas* (1); *Wall* v. *Stanwick* (2). The statute,

(1) 2 K. & J. 79, 83.

(2) 34 Ch. D. 763.

therefore, did not begin to run as to *John's* one-eighth at any rate till he attained twenty-one in 1877, and *Samuel* is clearly entitled to that one-eighth.

As regards *Samuel's* own one-eighth, the evidence shews that the testator was really in receipt of rents as his agent. The testator made admissions to that effect. The *onus* is on the other side to shew that *Samuel* made a gift of his share of the rents to his father: *Hoghton* v. *Hoghton* (1).

C. T. Mitchell, for the Defendants:—

In *Thomas* v. *Thomas* (2), the father, who had entered into possession, had no right of his own; he could only have taken a rightful possession as bailiff for the infant. The same observation applies to *Wall* v. *Stanwick* (3). In the present case the testator was himself legally entitled to three-fourths of the rents. Sect. 12 of the Act 3 & 4 Will. 4, c. 27, bars the present claim.

But, even if those cases apply to *John's* one-eighth, they have no application to *Samuel's*, and there is no sufficient evidence that the testator received his share of the rents as his bailiff or agent. There has been no acknowledgment which will take the case out of the statute. An acknowledgment by an agent is not sufficient: *Ley* v. *Peter* (4). The payment of rent after the statutory period had expired was of no avail: *Sanders* v. *Sanders* (5).

Mulligan, in reply:—

There were admissions that the father stood in the relation of bailiff to the son *Samuel*. A bailiff need not be appointed by writing. The statute does not apply to such a case.

NORTH, J. (after stating the facts, continued):—

There is no question as to the testator's own moiety of the property. The other moiety, which belonged to his wife, descended on her death in May, 1870, to her two sons, *Samuel* and *John*, in equal shares, subject to their father's tenancy by the courtesy of one-half of the moiety (*i.e.*, one-fourth of the whole), so long as he should remain a widower. On his marriage again

(1) 15 Beav. 278.
(2) 2 K. & J. 79.
(3) 34 Ch. D. 763.
(4) 3 H. & N. 101.
(5) 19 Ch. D. 373.

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in February, 1884, his interest by the courtesy came to an end, and that one-fourth of the property vested in possession in the two sons, and on the death of *John* intestate his moiety of that one-fourth descended to his brother *Samuel.* As to that one-fourth the title of *Samuel* is clear. The question which now arises is as to the other one-fourth which descended to the two sons immediately on the death of their mother. As regards the one-eighth which then descended to *John*, he was an infant at the time, and his father, having on the death of his wife entered into the receipt of the rents of the whole of the moiety, must be taken to have entered into the receipt of the one-eighth to which *John* was immediately entitled, as bailiff for his infant son. The father continued in receipt of the rents after *John* had attained twenty-one, and the cases which have been cited shew that, as he was in possession as *John's* bailiff at the time when *John* attained twenty-one, he must be taken to have continued in possession in the same character, unless something was done to change the character of his possession, and no such change has been proved. The brother *Samuel* is therefore now entitled to that one-eighth, and his title to three-eighths of the whole property is clear. The only question is as to the remaining one-eighth. To that one-eighth *Samuel* became entitled in possession on the death of his mother, and he was then of full age. When his father began to receive the rents of that one-eighth there was nothing in the relation of the parties to shew the existence of any agency or trusteeship, or that the father was receiving the rents as the bailiff of his son. The father remained in possession till June, 1884, and at that time some claim was set up by *Samuel.* But it is clear that no acknowledgment in writing of *Samuel's* title had been made by the father, and therefore the father had already acquired a good title against *Samuel* by the statute, so far as acknowledgment was concerned. Then it appears that a payment in respect of the rent due in June, 1884, was made by the father to *Samuel.* But at that time the statutory period of twelve years had run, and no payment of rent to *Samuel* could defeat the title which the father had already acquired under the statute. *Sanders* v. *Sanders* (1) is a clear

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(1) 19 Ch. D. 373.

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authority for that. That payment of rent, therefore, cannot support the present claim. It has been argued that there is evidence which shews that the father was in receipt of the rents as agent or trustee for his son *Samuel*, and that this prevents the statute being set up as a defence to his claim. I cannot find evidence of anything of that kind during the time in which the statute was running. There was no payment of rent to *Samuel* during that period. It is said that some admissions were made by the father of his son's title, but there was no acknowledgment in writing. The result is that, as regards this one-eighth of the property, the father, having entered into the receipt of the rents in 1870, acquired a good title to it at the end of the statutory period of twelve years. The certificate must be varied as to the item (5) by substituting one-eighth part (for one-fourth part) of the lands comprised in item (1).

Solicitors: *Saw & Son; Bolton & Mote.*

W. L. C.

NORTH, J. 1887 *July* 13.

STRICK *v.* SWANSEA TIN-PLATE COMPANY.

[1886 S. 1882.]

Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *ss.* 3, 4 [*Revised Ed. Statutes, vol. xvi., p.* 619]—*Agreement in restraint of Trade—Direct Enforcement.*

Members of a trade association were expelled for breach of rules in restraint of trade. The association passed a resolution to wind up, with a direction to their trustees to divide the surplus assets among the persons entitled under the rules. An inquiry was directed on summons as to who were the persons entitled, and in what proportions:—

Held, that the expelled members were properly excluded in the Chief Clerk's certificate made in answer to the inquiry.

IN the year 1874 a masters' trade association was formed under the title of the *Carmarthenshire and Glamorganshire Association of Tinplate Manufacturers.* The affairs of the association were regulated by an agreement subscribed to by the several members. In accordance with a provision contained in the agreement of association a resolution was passed at an extraordinary meeting of the association held on the 18th of February, 1886, that the

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association should be wound up, and its business closed, and its funds, after payment of all expenses and the clearing of liabilities, be divided amongst the persons who were then members of the association, or who were entitled to participate in the funds according to the rules, in the same proportion as they had contributed to the funds of the association, and it was resolved that the trustees of the society should be requested to pay over the funds after payment of expenses and clearance of liabilities to the persons entitled, and that upon such payment the trustees should be indemnified against all claims on the funds.

The rule of the association that provided for the distribution of its funds on winding-up was as follows: "That upon the winding-up and closing of the business of the association any funds that may be then in existence shall, after payment of all expenses and the clearing off of all liabilities, be divided amongst the members of the association in the same proportions as they shall have contributed to the funds thereof."

An originating summons was taken out by the trustees of the association (*George Burden Strick* and two others) as Plaintiffs; the *Swansea Tin-plate Company*, one of the members of the association being made Defendant to have it determined who were the persons entitled to share in the trust funds of the association having regard to the resolution for winding-up. An order was made on the summons directing an inquiry as to who were entitled to participate in the funds, and in what proportions. The Chief Clerk certified that twenty-one firms were entitled to participate in specified proportions, and disallowed the claims of seven firms, as having ceased to be members at the date of the winding-up resolution.

A summons taken out on behalf of five of the disallowed claimants to vary the Chief Clerk's certificate by having their claims allowed was now heard. All the five claimants had been expelled from the association under the following clause of the agreement of association: "That any person being a member of the said association who shall not act upon and keep all the rules of the said association shall thereupon cease to be a member thereof, and shall forfeit all moneys paid into the said association, and shall under no circumstances or conditions be entitled to any

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repayment, or to any compensation or allowance in respect of his being a member of the said association, or in respect of any claim which he may then have against the funds of the said association. But this clause shall not be enforced unless with the concurrence of three-fourths of the members of the said association present at an extraordinary meeting to be called for the purpose of considering the same."

It was admitted that the rules for breach of which some of the claimants had been expelled were in restraint of trade.

Cookson, Q.C., and *A. àB. Terrell*, for the summons:—

The rules for breach of which some, if not all, the Applicants were expelled, but for the *Trade Union Act*, 1871, s. 3, would have been illegal as being in restraint of trade. Sect. 4 provides that they cannot be directly enforced. We submit, therefore, that the Court, in giving judicial effect to the rules, or anything done under them, will disregard the rules in restraint of trade and everything done under those particular rules. The funds, therefore, must be divided in the same way they would have been divided if the rules in restraint of trade had never existed, and as if those expelled for breach of such rules had not been expelled in fact: we say the distribution of the funds on the footing of what has been done under those rules would be a "direct enforcement," and bring the case within *Rigby* v. *Connol* (1); *Duke* v. *Littleboy* (2), and not that of *Wolfe* v. *Matthews* (3).

Cozens-Hardy, Q.C., and *F. Thompson*, for the Plaintiffs, and *Everitt*, Q.C., and *Christopher James*, for the Defendants, were not called on.

NORTH, J.:—

The case of the Applicants is put upon two grounds; first of all, it is said that no attention can be paid to the rules in winding-up, because this is an illegal association. To support that contention the *Trade Union Act* of 1871 is referred to. It is said that the rules are illegal because the 4th section of that Act applies to this

(1) 14 Ch. D. 482.
(2) 28 W. R. 977.
(3) 21 Ch. D. 194.

case, and the rules being illegal, all that can be done is to divide the funds among the persons who contributed them, paying back what they contributed, after deducting such expenses as have been incurred or may be necessary. In my opinion, the 4th section has no application to the present case. The matter has come before the Court, and the Court has made a decree directing an inquiry to be prosecuted; that inquiry has been prosecuted, and I have nothing now to do except to follow that out to the legitimate result and distribute the funds accordingly. It is said that I am prevented by the 4th section of the Act, which says this: "Nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements,"—I need not read those, because it is admitted the agreement in the present case comes within them. But the time at which that has to be considered has passed, because the Court has entertained the present legal proceeding. Either no objection could have been taken to it under the 4th section (in which case the order was properly made, and the prosecution of it in due form is incumbent upon me); or the objection could have been taken, and the Court ought not to have entertained the proceedings. If that is the true view, it is too late to take the objection before me, because the Court has already entertained the proceedings, and made a decree which is binding upon me, which has to be carried out, and to which I am bound to give effect.

But then it is suggested also that, inasmuch as under that section the Court is not to entertain legal proceedings with respect to agreements that come under the various heads mentioned in the sub-sections to that clause—and this agreement does come under those heads—the agreement in those respects must be illegal, because, unless illegal, the Court would not have been directed that it was not to entertain the proceeding and give effect to it. But that argument is answered by the final words of that clause, which says: "Nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful." Therefore, under the 4th section, the time having passed at which the Court could consider whether the proceedings should be entertained, I cannot give effect to the clause for the purpose of stopping the proceedings; and the same section having also said that none of the agreements mentioned in that section were to be deemed to be unlawful by reason of that section, that section is entirely out of the present case.

Then it is said that the agreement is void because it is in restraint of trade. Before considering that I should say that I consider the 4th section does not preclude me in any way from working out the order which has been made. Then the question is in what way the funds are to be distributed. They are to be distributed in pursuance of the resolutions and according to the rules, and it seems to me, upon working that out, if I find that any rule is clearly illegal I cannot give effect to that illegal rule, and I must distribute the funds according to the legal rules, having regard always to the question whether each rule is in accordance with law or not. It may be that if I found that one of those rules was clearly illegal I should have to ignore that rule in distributing the funds and ascertain the right of the parties in the same way as they would have to be ascertained if that illegal rule did not exist. It may be, therefore, a very important question to consider whether, in working out the decree, any rule is illegal, and whether the distribution of the funds should be as proposed, among persons whose only claim is founded upon an illegal rule. I asked at an earlier period of the case which of the rules was illegal and why it was illegal: and was told that one or more of the rules are illegal because they are in restraint of trade. As regards that argument the 3rd section is very important, and the 3rd section says: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." Now, that section I take to mean this, that for the present purposes the agreement is to be in force and is not to be considered void or voidable by reason that a rule or rules which are said to be illegal are merely in restraint of trade. It may be that something which is in restraint of trade is something more than that. It may be illegal on other grounds, and if so it appears to me that I must treat such rule as void and not give effect to it. But if it is illegal merely because it is in restraint of trade—if that is properly

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called an illegality—if it is illegal on that ground only, then I am not to treat it as illegal and omit to give effect to the rule upon that ground. In this case it is obvious that the objections made to these rules are, because they are in restraint of trade, and no illegality is shewn in them beyond that.

That being so, it is clear that any illegality and defect in the rules, arising from their being merely in restraint of trade—if they are not illegal on any ground beyond that—is not such as to prevent me giving effect to them in the winding-up.

Solicitor for the claimants: *Thomas Smith*, agents for *Tennant & Jones, Aberavon.*

Solicitors for Plaintiffs: *Tamplin, Tayler, & Joseph.*

Solicitors for Defendants: *W. R. Smith & Co.*, agent for *W. R. Smith & Son, Swansea.*

D. P.

In re CHEPSTOW BOBBIN MILLS COMPANY.

NORTH, J.
1887
July 23.

Company—Winding-up Petition—Supervision Order or Compulsory Order—Wishes of Creditors—Costs—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 149 [*Revised Ed. Statutes, vol. xiv., p.* 234].

A petition for the compulsory winding-up of a company having been presented by a creditor, if, at the hearing of the petition, the petitioner asks only for a supervision order:—

Semble, that sect. 149 of the *Companies Act*, 1862, does not authorize the Court, even at the request of a majority of the creditors, to order a compulsory winding-up against the wish of the petitioner.

A petition having been presented by a creditor for the compulsory winding-up of a company, the Petitioner at the hearing asked for a supervision order, and that order was made:—

Held, that creditors who appeared and asked for a compulsory order were entitled to costs as supporting the petition.

PETITION by a creditor for the compulsory winding-up of the above company. The petition was presented on the 24th of June, 1887. It came into the paper for hearing on the 9th of July, and was then ordered to stand over for a fortnight, because an extraordinary general meeting of the company had been called to consider whether the company should be wound up voluntarily.

On the 18th of July an extraordinary resolution was passed for a voluntary winding-up. The petition came on again to-day for hearing. A creditor named *Fryer* had filed an affidavit, in which he stated that he had been advised that certain debentures which had been issued to the directors of the company were illegal, and that it was of the utmost importance to the creditors generally that the validity of those debentures should be strongly contested.

J. G. Wood, for the Petitioner, asked for a supervision order.

S. A. Sampson, for the company, consented.

R. F. Norton, for *Fryer*, and other creditors, the amount of whose debts was alleged to exceed one-half of the total indebtedness of the company, asked for a compulsory order. Sect. 149 of the *Companies Act*, 1862, provides that "the Court may, in determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court . . . . have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. . . . In the case of creditors, regard shall be had to the value of the debts due to each creditor." A majority of the creditors desire a compulsory order.

[NORTH, J.:—Is there any case in which, where a creditor, who has petitioned for a compulsory order, is content to take a supervision order, the Court has forced a compulsory order on him?]

The point does not appear to have been actually decided; the decisions on sect. 149 are collected in *Buckley* on the *Companies Act* (1).

Napier Higgins, Q.C., *amicus Curiæ*, referred to *In re Spence's Patent Cement Company* (2); *In re Home Assurance Association* (3). The latter case shews that the Petitioner is *dominus litis.*

Everitt, Q.C., *amicus Curiæ*, referred to *Re Owen's Wheel and Tire Company* (4).

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(1) 4th Ed. pp. 303, 304.

(2) Law Rep. 9 Eq. 9.

(3) Law Rep. 12 Eq. 59.

(4) 22 W. R. 151.

NORTH, J.:—

I can see no reason for acceding to the request of those creditors who ask me to force upon the Petitioner an order for a compulsory winding-up of the company, instead of the supervision order which he is willing to take. I am not satisfied that sect. 149 gives the Court jurisdiction to force on a petitioner a more extensive order than he asks for. If sect. 149 justified my doing this in such a case as the present, it would equally justify me in making a compulsory order if the Petitioner had only asked for a supervision order. The case of *In re Home Assurance Association* (1) is, so far as it goes, an authority against the existence of such a jurisdiction. There it was held that a creditor, who had petitioned for an order to wind up a company, was entitled to dismiss his petition with costs, notwithstanding the objection of another creditor who had appeared upon it. That creditor must have wished to have either a compulsory order or a supervision order made. In *In re Electric and Magnetic Company* (2) Mr. Justice *Fry* said that, as there was no precedent for making a compulsory winding-up order upon a petition which asked for a supervision order, he would allow the petition to stand over, in order that some other creditors, who desired a compulsory order, might, if they chose, present a petition of their own. I have not been asked to adopt that course in the present case, and I can see no reason for doing so of my own accord. The question of the validity of the debentures can be questioned in a winding-up under supervision just as well as in a compulsory winding-up. As, therefore, Mr. *Norton's* clients would gain no advantage by it, I decline to make a compulsory order, even if I have the power to do so. I shall make a supervision order, and I shall treat Mr. *Norton's* clients as supporting the petition, and they will be entitled to costs on that footing.

Solicitors: *Gregory, Rowcliffes, & Co.; Lewin, Gregory, & Anderson*; *G. S. Warmington.*

(1) Law Rep. 12 Eq. 59.

(2) W. N. 1881, p. 98.

W. L. C.

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July 25.

In re FAULKNER (A SOLICITOR).

Solicitor and Client—Costs—Taxation—Scale Fee "for conducting Sale"—Auctioneer paid by Client—Solicitors' Remuneration Act, 1881 (44 *&* 45 *Vict.* c. 44)—*General Order, August* 1882, *rule* 2; *Sched. I., part* 1; *r.* 11.

A solicitor was employed by the vendor in connection with a sale of property by public auction. An auctioneer was employed to sell the property, and was paid commission by the client:—

Held, reversing the decision of the Taxing Master, that, though the solicitor was not entitled to the scale fee "for conducting the sale" prescribed by Part 1 of Schedule I. to the Remuneration Order, he was entitled to his proper charges, according to Sched. II. to the Order, in respect of any work which he had done for which the auctioneer had not been paid, and which would have been included in the "conducting" fee, if the fee had been payable.

In re Emanuel and Simmonds (1) distinguished.

SUMMONS by a solicitor to review a taxation of costs. The solicitor had acted for the vendor, who was a mortgagee in possession, in the sale of the mortgaged property. An auctioneer was employed, to whom commission was paid by the vendor. The property was sold at the auction in two lots, for £380 and £420 respectively. In the bill which the solicitor delivered to the vendor he charged for the two lots £6 and £6 15*s.* respectively, as the scale fees under Part 1 of Schedule I. to the Solicitors' Remuneration Order of August, 1882, for "deducing title and perusing and completing conveyance." He also charged £13 6*s.*, the sum paid to the auctioneer for his commission and other charges. In addition to this the solicitor made various charges for attendances on the auctioneer, drawing particulars of sale, preparing advertisements for sale, attending to insert advertisements in newspapers, examining proofs of particulars and conditions of sale, distributing particulars and conditions, attending auction, &c., all these items relating to work done by the solicitor before the sale. An order to tax the bill was made on the application of the mortgagors as third parties. The Taxing Master, without going into the propriety of each of those items individually, disallowed them all. The solicitor objected to the disallowance, (1) because the items disallowed "are not costs which in Part 1 of Schedule I. to the Remuneration Order are included under the head of 'deducing title' or 'perusing or completing conveyance' or 'preparation of contract or conditions of sale,' nor are they costs included in the work for which the auctioneer was paid"; (2) "because, where no fee for conducting a sale is charged, the costs of instructing the auctioneer and preparing the particulars of sale and advertisements of sale, and issuing the same, and costs preliminary and incidental thereto and attending the sale, are properly chargeable by the vendor's solicitor having done that part of the business."

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(1) 33 Ch. D. 40.

In answer to the objections the Taxing Master said: "The solicitor objects to the disallowance of these items because they are not included in the words for which the *ad valorem* scale charge is expressed to be given in Part 1 of Schedule I. It is a fact that they, or nearly all of them, are not included in those words taken alone; but it is admitted that all the charges, the disallowance of which is objected to, are connected with the sale. I have disallowed these items, and overruled the objections, on the authority of *In re Emanuel and Simmonds* (1). The question for the decision of the Court is, whether the principle decided in that case in respect to a lease applies to a sale. It was decided in that case that, having regard to clause 2 of the Order, the scale charge, though expressed to be 'for preparing, settling, and completing lease,' covers all business connected with the lease. I consider it necessarily follows that the scale charges expressed to be for 'conducting a sale' and 'for deducing title, &c.', or the latter only if the former is not applicable, cover all business connected with the sale."

The solicitor took out a summons to review the taxation.

Cozens-Hardy, Q.C., and *Shebbeare*, for the solicitor:—

The solicitor is entitled to be paid under Schedule II. of the Remuneration Order for any work which he has done which is not included in that for which the auctioneer has been paid. *In re Field* (2) and *In re Emanuel and Simmonds* related to leases, and have no application to the present case. In the case of a lease only one "scale fee" is provided by the order; in the case of sales there are two scale fees, one "for conducting a sale, &c.," the other "for deducing title, &c." There is no fee corresponding to the former in the case of leases. Rule 11 in Schedule I. prevents a solicitor from charging the "conducting" fee when commission is paid by the client to an auctioneer, but it does not prevent the solicitor from charging for work done by him before the sale, which is not included in the work for which the auctioneer is paid. For such work he is entitled to be remunerated according to the old system as altered by Schedule II. In *In re Wilson* (1) charges similar to those now claimed were allowed by the Taxing Master. *Re Sykes* (2) is also an authority in favour of the claim.

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(1) 33 Ch. D. 40.

(2) 29 Ch. D. 608.

McSwinney, for the mortgagors:—

The solicitor is entitled to the scale fee only when no commission is paid by the client to an auctioneer, and, when an auctioneer is paid commission by the client, the solicitor is not entitled to be paid for work which would be included in the "conducting" fee, if that fee were payable.

[NORTH, J.:—Of course the solicitor cannot be paid for doing any work which the auctioneer has done, and if the auctioneer has done all the work, the solicitor will get nothing.]

If the solicitor had "conducted" the sale, so as to be entitled to the "conducting" fee, he would not have been also entitled to the charges which he now claims. That is a fair test.

The principle of *In re Emanuel and Simmonds* (3) applies. The point was not argued or decided in *In re Wilson*, or in *Re Sykes*.

NORTH, J.:—

The *Solicitors Remuneration Act*, 1881, with the General Order of August, 1882, and the schedules to it, lay down certain rules as to the costs which are to be allowed to solicitors under certain circumstances. Rule 2 of the Order provides that "the remuneration of a solicitor in respect of business connected with

(1) 29 Ch. D. 790.

(2) 56 L. T. (N.S.) 425.

(3) 33 Ch. D. 40.

sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the Chambers of any Judge or Master, is to be regulated as follows:" and then come three heads, (*a*), (*b*), and (*c*). (*a*) provides for the remuneration in respect of sales, purchases, and mortgages completed, which is to be that prescribed in Part 1 of Schedule I. to the Order; (*b*) provides for the remuneration in respect of leases and agreements for leases of the kinds mentioned in Part 2 of Schedule I. to the Order, which is to be that prescribed in Part 2 of Schedule I. Then comes sub-sect. (*c*), which provides the remuneration for "business not hereinbefore provided for," and, after mentioning a good many matters, adds: "And of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto."

Then we come to Schedule I., Part 1, and in it the first sum allowed is to the "Vendor's solicitor for negotiating a sale of property by private contract." That does not apply to the present case. The next item is, "Vendor's solicitor, for conducting a sale of property by public auction, including the conditions of sale." The next head is, "Vendor's solicitor, for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance." Therefore, in the case of properties sold by public auction, two fees are provided—a scale fee for "conducting" the sale (whatever that may mean) and a scale fee "for deducing title, and perusing and completing conveyance." In the present case the solicitor did deduce the title, and peruse and complete the conveyance, and the scale fee for that has been allowed him by the Taxing Master; but he also claims to be paid for work done which is not included in "deducing title, or perusing and completing conveyance." Now, looking at rule 2 (*b*) of the Order, "conducting a sale of property by public auction," and at rule 4, which provides that "the remuneration prescribed by Schedule I. is not to include (*inter alia*) auctioneer's charges"—looking at those two rules alone, I should have come to the conclusion that, if an auctioneer was employed and paid by the client, the solicitor was also to be paid the scale charge for conducting a sale by public auction. But rule 11, in Part 1 of Schedule I., provides that "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." In the present case the auctioneer's commission was paid by the client, and, therefore, the scale fee for "conducting" the sale is not to apply. If the auctioneer had been employed, and his commission had not been paid by the client, but had been paid by the solicitor, it is, I think, quite clear that the exception introduced by rule 11 would not apply, but that the scale fee for "conducting the sale" would properly be payable to the solicitor. That seems clear from the language of rule 11 itself, and the precise point is put by Lord Justice *Cotton* in *In re Wilson* (1). He says (2): "The property may have been in such a state that the solicitor could not alone do all things that were necessary for the sale, but in such a case, if he claims the *ad valorem* remuneration, he must get them done by a person paid by himself. As these things have been done at the expense of the estate I am of opinion that the solicitor cannot claim remuneration according to the scale. The Act and Rules were not intended to give the solicitor remuneration according to the scale where he does not do the whole of the work for which the remuneration is provided, but somebody else does and is paid by the client for part of that work." In the present case, therefore, certain work has been done by the solicitor for which he would be entitled to be paid the scale fee for "conducting the sale," if he had paid the auctioneer himself. I say some such work has been done, because I am not now dealing with the particular items. If no such work has been done, of course the Taxing Master will not allow the charges; but I think it clear that some such work has been done, and therefore I am dealing with the matter on that footing. The question, then, is this: the solicitor having done certain work for which, if he had paid the auctioneer himself, he would clearly be entitled to receive the scale fee, is he not to be paid for that work at all because the auctioneer has been paid by the client? I think that case is not provided for by rule 11. The scale fee for "conducting" does not apply, because the auctioneer has been paid

(1) 29 Ch. D. 790.

(2) 29 Ch. D. 794.

by the client, but that leaves the solicitor entitled to remuneration for doing those parts of the work of "conducting the sale" for which the auctioneer has not been paid. If all that the solicitor has done was auctioneer's work, then there is nothing for which he can be paid; but, if anything has been done by him which is not auctioneer's work, but which is part of the work of "conducting the sale," it seems to me that for those items he ought to receive payment. The contention is that, because he did not do the auctioneer's work himself, or pay the auctioneer who did it out of his own pocket, he is not to have any remuneration for the rest of the work which he did, inasmuch as the scale fee applies only when the solicitor has done the whole work of "conducting the sale," and it is said that, if he is not paid for the whole work, he cannot be paid for any part of it. That contention seems to me to be inconsistent with the view which has been taken by the Court of the scale fee for "deducing title," for it has been held that a solicitor cannot be paid the scale fee for "deducing title, &c.," unless he does all the work of "deducing the title, and perusing and completing the conveyance." Now, if Mr. *McSwinney's* argument was sound as to the scale fee for "conducting the sale," it seems to me to follow that, unless a solicitor had done all the work in connection with "deducing the title, &c.," and had so earned the scale fee, he ought not to be paid anything at all. But that is directly contrary to the decisions of the Court of Appeal in *In re Lacey & Son* (1) and other cases, in which it was held that, when a solicitor had done part of the work included under the scale fee for "deducing title, &c.," but had not done the whole, though he could not be allowed the scale fee, he was entitled to be paid under Schedule II. for the work which he had done. It seems to me that the cases which have applied that construction to the scale fee for "deducing title, &c.," are authorities for saying that the same construction must be applied to the fee for "conducting a sale," when part only of the work contemplated by that fee has been done by the solicitor; as when, for instance, an auctioneer has been employed at the client's expense. I think the Taxing Master has made a mistake in holding that the cases relating to leases, which seem

(1) 25 Ch. D. 301.

to me not to apply to the case of a sale, govern the present case.

In *In re Wilson* (1) the precise point now raised was raised before the Taxing Master, and similar charges were allowed by him. The judgments of the Court of Appeal do not touch the point, for it was not before them for decision, but they did not express any opinion adverse to the propriety of those charges. Similar charges for work which had been done by a solicitor were apparently allowed in *Re Sykes* (2). Those cases shew that the practice in the Taxing Master's office has been, when the scale fee for "conducting a sale" is not allowed to a solicitor, to allow him such charges outside the scale fee in respect of work properly done as he would be entitled to under Schedule II. That seems to me to be the right rule, and I think that the decisions upon Part 2 of Schedule I. do not affect the present case. The matter must, therefore, go back to the Taxing Master, with the intimation of my opinion that he is not precluded by the decision referred to in his reasons from allowing such of the charges which he has disallowed as are proper.

The costs of Mr. *Cozens-Hardy's* client will be costs of the taxation.

Solicitors: *Hensman & Marshall*, agents for *J. J. Faulkner, Northampton; Soames, Edwards & Jones.*

(1) 29 Ch. D. 790.

(2) 56 L. T. (N.S.) 425.

W. L. C.

In re WILLIAMS.
JONES *v.* WILLIAMS.

[1886 W. 3709.]

NORTH, J.
1887
July 28.

Statute—Repeal — Administration — Priorities — Savings Banks Act, 1863 (26 & 27 *Vict. c.* 87), *s.* 14 [*Revised Ed. Statutes, vol. xiv., p.* 641]—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10 [*Revised Ed. Statutes, vol. xvii., p.* 740]—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 40, 125.

The actuary of a savings bank died insolvent, owing the bank money received in his capacity of actuary:—

Held, that in an action in the Chancery Division for the administration of the actuary's estate the bank would be entitled to priority by virtue of sect. 14 of the *Savings Bank Act*, 1863; but that sect. 40 of the *Bankruptcy Act*, 1883, takes away the right to such priority in bankruptcy proceedings.

Sect. 125 of the *Bankruptcy Act*, 1883, discussed.

THIS was an originating summons taken out by two of the trustees of the *Cardiff Savings Bank* on behalf of themselves and the other trustees of the bank as Plaintiffs. The Defendant was *Joseph Lloyd Williams*, the sole executor of *James Emerson Williams*, late the actuary of the bank. The deceased at the time of his death was indebted to the bank in a sum of over £32,000 in respect of moneys received by him in his capacity of actuary and manager. The assets of the deceased amounted to about £400, and his debts to creditors other than the bank amounted to about £200. The bank was a savings bank subject to the provisions of the Act 26 & 27 Vict. c. 87.

The summons asked (1) for an account of the personal estate of the testator come to the hands of the executors; (2) an inquiry as to the outstanding personal estate of the testator; (3) an inquiry as to his funeral expenses; (4) a declaration that by virtue of the 14th section of the statute 26 & 27 Vict. c. 87, the trustees of the *Cardiff Savings Bank* were entitled to a first charge on the assets, estate, and effects of the testator for the amount of all moneys due to them from the testator and received by him by virtue of his office, and to have such estate and effects paid and delivered by the Defendant to the trustees; (5) in the alternative an inquiry as to debts; (6) a receiver.

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The Plaintiffs as two of the trustees of the *Cardiff Savings Bank* had given formal notice to the Defendant under sect. 14 of the *Savings Bank Act*, 1863, to pay and deliver up all property of the bank come to the hands of his testator and repay out of the testator's assets all moneys due to the bank, and received by him in his capacity of officer of the bank in priority to all other debts.

Upjohn, for the Plaintiffs :—

Even were the estate being administered in bankruptcy under the existing *Bankruptcy Act* of 1883, the Plaintiffs would be entitled to priority by virtue of sect. 14 of the *Savings Bank Act*, 1863. That section is universal in terms, and unless it has been expressly repealed or its effect has been taken away, either generally or in particular cases by necessary implication, it is still in force. The fact that it is not mentioned in sect. 40, sub-sect. 6, of the *Bankruptcy Act* (which does no doubt expressly save two other enactments) is not sufficient to affect it. A general Act is not repealed by a special Act: *London and Blackwall Railway Company* v. *Limehouse Board of Works* (1); *Birkenhead Docks Trustees* v. *Laird* (2); *Fitzgerald* v. *Champneys* (3).

[NORTH, J.:—The case of *Ex parte Bailey* (4) seems very much in point. That is a case in which a similar provision in a *Friendly Societies Act*, which had been made applicable to building societies, was held to be inoperative so far as regards building societies in bankruptcy.]

That was a case depending on the special words of the *Bankruptcy Act*, 1849. It does not affect the general principle of construction of Acts of Parliament laid down in the cases cited and *Conservators of the River Thames* v. *Hall* (5).

Assuming that the effect of sect. 40 of the *Bankruptcy Act* would be to deprive the Plaintiffs of their privilege in bankruptcy, a rule putting the Plaintiffs on the same level as the general creditors, is not one that is imported into the administration of the insolvent estates of deceased persons in the Chancery Division:

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(1) 3 K. & J. 123.
(2) 4 D. M. & G. 732, 742.
(3) 2 J. & H. 31.
(4) 5 D. M. & G. 380.
(5) Law Rep. 3 C. P. 415.

In re Maggi (1); *Lee* v. *Nuttall* (2); *In re Withernsea Brickworks* (3).

Vernon R. Smith, for the Defendant:—

Sect. 40 of the *Bankruptcy Act* is a general enactment putting all creditors on a level except in cases otherwise provided by the Act, that of itself sweeps away in bankruptcy all priorities not expressly kept alive. Further than that, a priority of a very similar nature under the *Friendly Societies Act*, 1875, is expressly kept alive. If the Legislature had intended to keep alive in bankruptcy the provision in the *Savings Bank Act* as well as that in the Act, both enactments would have been mentioned. *Ex parte Bailey* (4) seems to decide the point.

In the second place, assuming the first point in the Defendant's favour, the rule of bankruptcy taking away the priority of one class of creditors is a rule "as to the respective rights of secured and unsecured creditors" which is imported into the administration of the insolvent estate of a deceased person: *In re Maggi*; *Mersey Steel and Iron Company* v. *Naylor* (5).

By sect. 125 of the *Bankruptcy Act*, 1883, the administration of the insolvent estate of a deceased person may be commenced in or removed into bankruptcy, it would be most anomalous if the mere accident in what Court the estate was being administered could affect the rights of the parties.

Upjohn, in reply.

North, J.:—

This is a summons taken out by *David Jones* and *Peter Davies*, two of the trustees of the *Cardiff Savings Bank*, on behalf of themselves and all other the trustees of the bank, the Plaintiffs, against *Joseph Lloyd Williams*, the legal personal representative of *James Emerson Williams*, the deceased, and what it asks is an administration decree with a declaration that by virtue of the 14th section of 26 & 27 Vict. c. 87, the Plaintiffs are entitled to a first charge on all the property (I am reading it shortly) of *Williams* to the amount of all moneys due to the bank from *Williams*, and which *Williams* received by virtue of his employment as actuary.

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(1) 20 Ch. D. 545.
(2) 12 Ch. D. 61.
(3) 16 Ch. D. 337.
(4) 5 D. M. & G. 380.
(5) 9 App. Cas. 434.

The section on which that application is based is the 26 & 27 Vict. c. 87, s. 14, and is as follows:—"If any person already appointed or who may hereafter be appointed to any office in a savings bank, and being intrusted with the keeping of the accounts, or having in his hands or possession by virtue of his said office or employment any moneys or effects belonging to such savings bank, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or have any execution or attachment or other process issued against his lands, goods, chattels, or effects," and then there are certain other cases referred to, the "persons having legal right, or the sheriff or other officer executing such process, shall, within forty days after demand made by two of the trustees of the said savings bank as aforesaid, deliver and pay over all moneys and other things belonging to such savings bank to such person as the said trustees shall appoint," I pause there for a moment, because that is a part of the section which relates to the property of the savings bank. Then it proceeds, "and shall pay out of the estates, assets, or effects of such person all sums of money remaining due, which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid is paid over to the party issuing such process, and all such assets, lands, goods, chattels, estates, and effects shall be bound to the payment and discharge thereof accordingly." Now, that section contemplates two things: in the first part of it, the handing over to the savings bank what is their property, or what may be called their property, by an attachment having issued against it; and, more than that, it is also to pay out of the assets of the officer the amount of the debt whether there is any charge upon them or not, and then there is a provision that the assets, estates, and effects shall be bound to the payment and discharge thereof accordingly. Now, no Act has been referred to which repeals that section, which is the law at the present day; but the question raised is this, not whether that section is repealed, but whether there is not subsequent legislation which has rendered that section inapplicable to cases where the estate of the officer is being distributed in bankruptcy, or is being administered by the High Court of Justice in a suit to administer the estate.

Now certain cases were referred to on the effect of a subsequent statute in repealing the provisions of an earlier statute, and those cases, although not exactly *in pari materia*, are not entirely inapplicable. I think it is sufficient to refer, for the present purpose, not to the cases cited, but to the observations of Lord *Hatherley*, who decided the cases cited, in the House of Lords in *Garnett* v. *Bradley* (1). He says: "When an Act of Parliament repeals a preceding Act which relates to a certain definite subject-matter distinctly laid down for the guidance of those who are to be operated upon by the Act of Parliament in that special matter, or to a particular class of persons who are to be either protected, or it may be, affected adversely by a particular clause of the enactment, then the Legislature is presumed to have had that very special subject-matter and that very special class of persons in contemplation when the subsequent statute was passed; and if there was a general Act subsequently passed, the generality of which was large enough, as far as words go, to comprehend the particular matter dealt with in the previous enactment, it will be considered whether or not, as regards the persons who are to be affected or protected by the Act, persons who are not in any way mentioned or specified by the subsequent general Act are to be injuriously affected by an adverse enactment, or deprived of a benefit they are entitled to under a previous enactment. And in that case the Court, in construing the subsequent general Act of Parliament, would expect to find something or other pointing out that the attention of the Legislature had been turned towards the former special enactment, and, in passing the general Act, that it had made the new enactment with the view of embracing every case (including that special case) embraced within the provisions of the previous Act." That is to say, it does not necessarily follow that the previous Act is to remain standing, notwithstanding the general provisions of the subsequent Act, if it is found on the consideration of the Act, or Acts, that such is not the intention of the Legislature.

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(1) 3 App. Cas. 944, 952.

Now, it is clear that the provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act, either from the express language used being addressed to that particular point, or from implication or inference from the language used; and in the case which was cited yesterday of the *Conservators of the River Thames* v. *Hall* (1), Mr. Justice *Byles*, in speaking of the two Acts then before the Court, puts it in this way (2):—"There is no express repeal of that provision" (that is the provision in the earlier Act) "by the *Thames Conservancy Act*, 1857" (which was the later one) "but we are asked to imply a repeal of it. The Court must be satisfied that the two enactments are inconsistent before they can from the language of the later imply a repeal of an express prior enactment." Now I have already said that I do not think that that section which I have read is repealed, and therefore that language is too extensive for the particular case; but the principle is exactly the same in considering whether you can imply a repeal of a prior enactment, or whether you imply that the earlier enactment is not to be applicable to the particular case dealt with by the subsequent Act. Then, Mr. Justice *Keating* says (3):—"It is said that the 388th section of that Act is impliedly repealed by the 96th section of the *Thames Conservancy Act*, 1857. I entirely agree with my Brother *Byles*, that, before we come to that conclusion, we are bound to satisfy ourselves that it is a necessary implication." Now, in the present case, what is the operation of the *Bankruptcy Act* on the section in the *Savings Bank Act* which I have read. The object of the *Bankruptcy Act* is to deal with the estates of bankrupts only, but to provide a fair division of the assets of the bankrupt between the creditors. Sect. 37 of the Act provides what debts can be proved in bankruptcy, and then the 40th deals with the property of the bankrupt, and says: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts," then there are certain things expressed in sub-sect. 1, including taxes, wages of clerk, or servants, for a limited period, and the wages of workmen for a limited period also, and then sub-sect. 2 says, "the foregoing debts shall rank equally between themselves, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves." Then the next sub-section provides for the mode of application of joint and separate estates respectively, and then comes the 4th sub-section which says: "Subject to the provisions of this Act all debts proved in the bankruptcy shall be paid *pari passu*." It seems to me, therefore, stopping there for a moment, that this is the repeal of the former *Bankruptcy Acts*, the consolidation of those Acts so far as they are consolidated, and the enactment of a new code by which the administration in bankruptcy is to be regulated from that time forward; and there is this, that all debts proved in the bankruptcy are to be paid *pari passu*. Then there is a provision that if there is any surplus after paying the debts interest may be paid, and then comes the 6th sub-section: "Nothing in this section shall alter the effect of sect. 5 of the Act 28 & 29 Vict. c. 86, 'to amend the Law of Partnership,' or shall prejudice the provisions of the *Friendly Societies Act*, 1875." Now the Act referred to as having been passed to amend the law of partnership is the Act known as *Bovill's Act*, by which a preference is not being given to a particular person, but that particular person is postponed. That Act provides that a loan to a trader on an agreement to share profits is not in itself sufficient to render him a partner, but the 5th section provides that in the case of the bankruptcy of such a trader, a person who has lent money on those terms is not to be entitled to be paid in the bankruptcy until all other creditors have been paid. Therefore it is in that case a postponement of the particular creditor. Then the other exception referred to is the provision of the *Friendly Societies Act*, 1875, and that is a provision which corresponds, not quite *verbatim*, but substantially, with the first portion of the clause which I have read from the *Savings Bank Act*, enabling friendly societies to recover the money belonging to them in the hands of an officer or his representative, or money on which they have got a charge by having already an execution issued against it;

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(1) Law Rep. 3 C. P. 415.

(2) Law Rep. 3 C. P. 419.

(3) Law Rep. 3 C. P. 420.

but it does not contain any provision like that contained in the second portion of the savings bank section, to the effect that not only shall any money in the hands of the officer belonging to the society be paid over, but that they shall have a preferential charge over all his assets for the amount due. Why this preference is given to the *Friendly Societies Act* I do not know, but I find it here; and finding it here, effect must be given to it. But then, it seems to me, that subject to the two exceptions mentioned in the 6th sub-section, this general scheme for the administration of an estate in bankruptcy is what is to be the law from this time forwards, and provides what particular preference is given by the Act, and excludes the right of any other person to be paid in preference to the other creditors.

Then, there is a case which seems to me really very much in point. The case was cited yesterday of *Ex parte Bailey* (1). In that case the trustees of a building society sought to recover from the bankrupt moneys received by him as treasurer of the society. The *Friendly Societies Amendment Act*, sect. 12, contained a provision very similar to sect. 14, which I have read from the *Savings Bank Act*. That relates to friendly societies, and not building societies. Then the *Building Societies Act* incorporated the provisions of the *Friendly Societies Act* in terms which made the 12th section of the *Friendly Societies Act* apply to the case of building societies. Then came the *Bankrupt Law Consolidation Act* of 1849, which was the Act in operation at the time this case was decided. The 1st section of that Act provided that "from and after the commencement of this Act the several Acts and parts of Acts set forth in the schedule A to this Act annexed, to the extent to which such Acts or parts of Acts are by such schedule expressed to be repealed, and every other Act or Acts, and such parts of every other Act or Acts, as shall be inconsistent with this Act, shall be repealed," except so far as they repeal former Acts. Then, the 167th section of the same Act introduced a new provision relating to officers of the friendly societies, giving a certain preference with respect to them, and then the 187th section provided for the general distribution of the bankrupt's estate equally between the creditors.

(1) 5 D. M. & G. 380.

The case being one relating to building societies the benefit of the 167th section of the *Bankrupt Law Consolidation Act*, which only applies to friendly societies, did not apply to building societies, and the clause which applies to building societies, if any, was sect. 12 in the previous *Friendly Societies Act*, and the question was whether that applied to this case. Lord Justice *Knight Bruce* held that it did not, and Lord Justice *Turner* says this (1): "I am of opinion, however, that the petitioners are not entitled under any of these enactments to the relief which they ask. The 167th section of the *Consolidation Act* is in terms confined to societies established under the Acts relating to friendly societies, and this society is established not under any of those Acts, but under the *Benefit Building Societies Act.* The Legislature, when it passed the *Consolidation Act*, must be presumed to have had, and no doubt had, under its view, the provisions both of the Acts relating to friendly societies and of those relating to benefit building societies. It has thought proper to limit the particular relief granted by this section to societies of the former description, and the Courts have no power to extend that relief to other societies. If, therefore, the Petitioners have any claim to this relief, their right must be founded upon the combined operation of the other Acts; but the *Consolidation Act* has, by the 1st section, repealed not only the particular Acts which are specified, but all other Acts and parts of Acts which are inconsistent with that Act, and it has by its other provisions appropriated the whole estate of the bankrupt to the payment of certain descriptions of creditors, who, according to that Act, are entitled to be paid in full, and subject thereto to the payment of the other creditors, in proportion to their respective debts; and it would clearly be inconsistent with these provisions, that payment in full should be made to any creditor whose debt is not by the Act directed to be so paid. I am of opinion, therefore, that the 4th section of 6 & 7 Will. 4, c. 32" (that is the *Building Societies Act*), "is repealed by the *Consolidation Act*, and consequently that this petition must be dismissed." Now, these observations seem to me to apply exactly to the present case. In the *Bankruptcy Act* the Court has thought fit to introduce an express exception of and reservation of rights arising out of the provisions of the *Friendly Societies Act*, 1875. The provisions of that Act and the provisions of the 14th section of the *Savings Bank Act* are *in pari materia*, and I cannot at all understand why the one should be specially reserved, and the other not mentioned. There are only two reasons which can account for it. It may have been deliberately left out, because it was not intended to be kept in operation in case of bankruptcy. That is one view of the case. The only other view that seems to me possible is that that Act was forgotten or overlooked when the *Bankruptcy Act* of 1883 was in preparation and was passed. It seems to me that I cannot deal with it on any such footing as to suppose that that Act was forgotten. If it would have been put in if thought of, but has been left out because it has been forgotten, the persons who claim under it cannot get any benefit under it. I cannot proceed on any surmise that it has been passed over *per incuriam*, or that the whole matter was not before the Legislature when they passed the 40th section of the Act of 1883, and only excepted out of that the operations of the *Friendly Societies Act* to which I have referred. It seems to me, therefore, that if this was the administration of an estate in bankruptcy, the preference created in favour of friendly societies would not apply, and to that extent the section is avoided so far as bankruptcy is concerned by express provision entirely inconsistent with it.

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(1) 5 D. M. & G. 386.

But then it is said that this is not a case of bankruptcy, but of administration of the estate of a deceased debtor in the Chancery Division, and therefore that section does not apply. It is said that it is made to apply by the 10th section of the *Judicature Act*, 1875, which provides that in the administration by the Court of the assets of any deceased person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. Now, the law of bankruptcy for the time being in force is, of course, the Act of 1883. But it does not say that in such cases all the provisions of the law of bankruptcy shall apply, but only that the same rules shall prevail and be observed as to particular things. The question is whether the priority of the creditors *inter se* is one of those things which is reserved. That point is settled, as far as I am concerned, by the decision of Lord Justice *Fry* in the case of *In re Maggi* (1). The various cases on the complicated subject relating to the construction of that section were cited, and he deals with them, and, without reading the judgment, I may read this: "The question is whether, by force of sect. 10 the provision of sect. 32 of the *Bankruptcy Act* that, with the exceptions mentioned in it, all debts shall be paid *pari passu*, is imported into the administration of insolvent estates of deceased persons." That is the very point which I have to deal with. He refers to the cases and he comes to the conclusion that this is not one of the matters in which the administration in Chancery is assimilated to that in the Court of Bankruptcy, and therefore in the administration of the estate here the rule in the Court of Bankruptcy does not apply.

The result will be this—the Plaintiffs are, I am told, creditors of their actuary and cashier's estate for upwards of £30,000. The other debts amount to something like £200, and the assets I think I was told were under £400. The result will be that in any case the claim of these creditors must have almost exhausted the assets, but it seems to me that in the present case their right of priority is not to be excluded.

There is one argument used by Mr. *Vernon Smith* which I ought not to omit to notice, and that is that in the *Bankruptcy Act*, 1883, new provisions altogether are contained in the 125th section. That enables the Court of Bankruptcy to deal with the estate of a person who has not become bankrupt, but, if one may use the phrase "whose estate is bankrupt," that is who, without having been adjudicated bankrupt, dies insolvent, and the provision of that section is: "Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy." Then the 2nd sub-section provides that on proof of the debt the Court may, unless it is satisfied that there is a reasonable probability that there will be sufficient to pay all the debts in full, which is clearly not the case here, make an order for the administration of the deceased debtor's estate, or may upon cause shewn dismiss such petition with or without costs. Then, the 5th sub-section provides that on an order being made for the administration of the deceased debtor's estate the property of the debtor shall vest in the official receiver of the Court as trustee thereof, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act; that is to say, the estate of the deceased debtor is to be administered in the same way as if he had become bankrupt; and the observation made by Mr. *Vernon Smith* was this, that unless the *Bankruptcy Act* is imported into the administration of the estates of insolvents in the Chancery Division, this result would follow, that the interests of the creditors are to depend entirely upon the question whether proceedings are commenced in Bankruptcy or in the Chancery Division, because if commenced in Bankruptcy clearly there is no priority in favour of the savings bank, but if commenced in the Chancery Division such priority will exist. It seems to me that there is such inconsistency, but that the way of getting over it is this. The 4th sub-section of sect. 125 of that Act contains this provision: "A petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of Justice for the administration of the deceased debtor's estate, but that Court may" (that is the Court where the administration is commenced) "in such case, on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned Court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor." Therefore, the way out of that apparent inconsistency between the two is that in the case of a deceased debtor, whose estate is insolvent, any creditor may apply to the Court which is asked to administer the estate not in bankruptcy, to direct a transfer to bankruptcy, where the assets would be divided equally between them. It seems to me, therefore, that although there is the inconsistency in the provisions of the two Acts as to the mode in which the assets are to be divided, a way out of that difficulty is provided by the Act by which the administration of the assets according to the law of bankruptcy is secured to the creditors who desire it.

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(1) 20 Ch. D. 545, 549.

Under these circumstances I come to the conclusion that the Plaintiffs are right in their contention. I have expressed my opinion on this point, because whether any application is made to the Court for such a transfer or not the estate must be dealt with according to the views that I have indicated; but there are other creditors interested in the matter, and it is not the practice on the hearing of an action for administration at the instance of one creditor finally to decide behind the backs of the other creditors that the Plaintiff has a right in priority to them. Therefore, I cannot insert the declaration which I am asked to do in the decree, because it seems to me that such a declaration at the present time would prejudicially affect the rights of absent parties, and therefore it ought not to be inserted in that form.

Solicitors: *Bell, Brodrick, & Gray; Smiles, Binyon, & Ollard.*

D. P.

NORTH, J.
1887
Aug. 1, 2.

In re RHODES.
RHODES *v.* RHODES.

[1886 R. 668.]

Presumption of Death—Person not heard of for Seven Years—Proof of Time of Death.

The administrator of a person who had not been heard of since 1873 had in his hands a sum of money belonging to the intestate. He took out an originating summons upon which inquiries were directed, in answer to which the Chief Clerk found that the intestate was dead in 1880, but that there was no evidence to shew that he died at any date before that year. The Chief Clerk also found the persons who would have been the intestate's next of kin if he died in 1873, and the persons who would have been his next of kin if he died in 1880. The two classes consisted of different persons:—

Held, that neither class of next of kin had made out a title to the fund, but that the case must go back to the Chief Clerk for further inquiry.

In re Westbrook's Trusts (1) commented on.

ALFRED RHODES emigrated to *Australia* in the year 1850. After the year 1873 he was never heard of by any member of his family. In the year 1885 administration to his estate was granted by the Court of Probate, it being presumed that he was dead, because he had not been heard of for seven years. The Plaintiff was his administrator, and he had in his hands a fund to which *Alfred Rhodes* had become entitled under the will of his father. The Plaintiff took out an originating summons, on the hearing of which the following inquiries were directed: (1) an inquiry when *Alfred Rhodes* died; (2) an inquiry who were his next of kin according to the statute living at the time of his death, and whether any of them had since died, and, if so, who were their respective legal personal representatives. The Chief Clerk by his certificate found: (1) that *Alfred Rhodes* was last heard of in 1873, and that he was dead in 1880, but that there was no evidence to shew that he died at any date before that year. (2) That, if *Alfred Rhodes* was held to have died when he was last heard of, viz., in the year 1873, and then to have died a bachelor, his next of kin living at the time of his death, assuming that he died on any day in that year, would have been his mother and two of his brothers. Those three persons had all since died, and the Chief Clerk stated who their respective legal personal representatives were. But, if *Alfred Rhodes* died on any day between the 1st of January and the 31st of December, 1880 (both days inclusive), and died a bachelor, his next of kin would have been the six children of his deceased brother *Benjamin*. One of those six children had since died.

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(1) W. N. 1873, p. 167.

The summons now came on for further consideration.

Cozens-Hardy, Q.C., and *Bardswell*, for the Plaintiff, stated the case.

Joseph Tanner, for the 1873 next of kin:—

If there is any presumption at all, it is that the intestate died immediately after he was last heard of. It is true that in *Nepean* v. *Doe* (1), *In re Phene's Trusts* (2), and *Reg.* v. *Lumley* (3), it is laid down that, when a person has not been heard of for seven years, though there is then a presumption of law that he is dead, there is no presumption that he died at any particular time within the seven years, but the *onus* of proving the particular time of death is on the person whose title is founded on death at that time. But, in delivering the judgment of the Court of Exchequer Chamber in *Nepean* v. *Doe*, Lord *Denman*, C.J., said (4): "When nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. . . . . The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years." In *In re Lewes' Trusts* (5), Lord Justice *James* said (6): "If anything is to be presumed it would be, according to *Nepean* v. *Doe*, that the death took place on the first day of the seven years."

(1) 2 M. & W. 894.
(2) Law Rep. 5 Ch. 139.
(3) Ibid. 1 C. C. 196.
(4) 2 M. & W. 913.
(5) Law Rep. 6 Ch. 356.
(6) Ibid. 357.

We are not making an adverse claim; the question is, how the fund in the Plaintiff's hands ought to be distributed?

B. Eyre, for the 1880 next of kin:—

The *onus* is on those who allege that the intestate died before the end of the seven years. It is found that he was dead in 1880, and there is no evidence that he died before then. His next of kin at that time must be entitled to the fund. The 1873 next of kin can succeed only by shewing that the intestate died before 1880. In *In re Westbrook's Trusts* (1) a person who was entitled to a fund in Court went to *Australia* in 1848, when he was twenty-four and unmarried, and had not been heard of since 1851, when he wrote to his family from *California*, stating his intention of returning to *England* in a few months. A petition having been presented for payment of the money out of Court, Vice-Chancellor *Malins* said that, as it was necessary to fix some period of death, he thought seven years after the deceased was last heard of would be the right period. In *Taylor* on Evidence (2) it is said, "after the lapse of seven years, the presumption of life ceases, and the burthen of proof is devolved on the party denying the death."

Aug. 2. NORTH, J.:—

The Chief Clerk has not answered the inquiry, when *Alfred Rhodes* died. I have looked at the evidence which was before the Chief Clerk, and I have no doubt that it ought to be assumed that *Alfred Rhodes* died a bachelor, but the inquiries when he died, and who were his next of kin at the time of his death, have not been answered. There are two sets of claimants—the persons who would have been his next of kin if he died in the year 1873, and the persons who would have been his next of kin if he died at any time in the year 1880. There is no evidence upon which I can say at present that either of the two sets of claimants is entitled to the fund, and the case must go back for further inquiry. The difficulty arises from this, that the persons who would be entitled to the fund if *Alfred Rhodes* died at the beginning of the period of seven years are not the same as those

(1) W. N. 1873, p. 167.

(2) 8th Ed. vol. i. p. 218, plac. 200.

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who would be entitled if he died at the end of the period, and it is clear also that at some point of time during the interval the persons entitled would have been different from those who would have been entitled in either of those cases, or, at any rate, if they were the same, they would take in different shares. Of course, the persons who are really entitled are those who were the next of kin of *Alfred Rhodes* at the time of his death. I have been asked to say that the persons who would have been his next of kin in 1880 are entitled to the fund, and *In re Westbrook's Trusts* (1) is cited as an authority for that conclusion. A note of that kind cannot be relied on as a sufficiently accurate report of the case, and the *Weekly Notes* are not intended for citation. But I have often derived great assistance from them, and they are useful in putting one on the track for further inquiry. In the note which is given of the judgment, Vice-Chancellor *Malins* is reported to have said that, "as it was necessary to fix some period of death, he thought seven years after the time *George Westbrook* was last heard of would be the right period; and as nothing had been heard of his marriage, it must be presumed after this lapse of time that he had left no widow, and therefore he should limit the inquiry as to the persons entitled, to the brothers and sisters and their representatives." The Vice-Chancellor did not say that he thought the end of the seven years was the time at which the interests of the parties entitled was to be ascertained, and I am not sure that the inquiry which he directed was based on that assumption. If it was, I could not follow his decision, for it would be inconsistent with some decisions of the Court of Appeal with which he must have been familiar. In one of them a previous decision of his own was overruled. The first of those cases was *In re Phene's Trusts* (2). In that case Lord Justice *Giffard* (3) cited this passage from the judgment of the Court of Exchequer Chamber in *Nepean* v. *Doe* (4): "Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time during which he was not heard of has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years." That has been constantly acted upon since, and it is utterly at variance with that which is suggested to have been the decision of Vice-Chancellor *Malins* in *In re Westbrook's Trusts* (1). The other case is *In re Lewes' Trusts* (2). There a legatee under the will of a testator, who died in February, 1860, left *England* in 1858, and was last heard of by a letter from *Australia*, dated in January, 1859. The legacy had been paid into Court, and in 1870 the residuary legatee petitioned for payment to himself, on the ground that, in the absence of proof that the legatee had survived the testator, the legacy must be taken to have lapsed. Vice-Chancellor *Malins* ordered the money to be paid to the residuary legatee, and the Court of Appeal affirmed the decision. Lord Justice *James* said (3): "The rule of law laid down in *Nepean* v. *Doe* (4) is, that when any person has to prove the fact of death, he proves it by presumption of law from the lapse of time, but when he has to prove the time of death, he must prove it affirmatively, for there is no presumption that the death took place at any time in that seven years. If anything is to be presumed it would be, according to *Nepean* v. *Doe*, that the death took place on the first day of the seven years." I do not think that was the opinion of Lord Justice *James*; I think he only meant to say that, if you were obliged to choose any day, you would choose the first day of the seven years rather than any other. The Lord Justice continued: "Death is presumed from the person not being heard of for seven years, and whoever has to make out the case of death at any particular time must prove it by affirmative evidence, and those who claim under a person who is said to have survived a particular period must prove the fact." And Lord Justice *Mellish* said (1): "If at the end of seven years a person has not been heard of, the presumption is that he is dead, but there is no presumption as to when, during the seven years, he died. The person upon whom it rests to prove the affirmative, either that the legatee was alive or that he was dead at a particular period, must establish the proposition by distinct evidence, and not by shewing merely that he was alive at the beginning of the period." If it had been material for the decision of that case, the Lord Justice would no doubt have added, "or by shewing merely that he was not alive at the end of the period." I may refer also to *Hickman* v. *Upsall* (2), in which, from the circumstances under which a person, who had not been heard of for more than seven years, had left her home, and had never again applied for the payment of a small sum of money which had been usually paid to her quarterly, Vice-Chancellor *Hall* came to the conclusion that she had died soon after the commencement of the seven years. I recollect another case, in which I was counsel, where Vice-Chancellor *James* came to the conclusion that a man, who had left *Singapore* two days before he would have attained twenty-one, and who had not been heard of for seven years, had died under twenty-one. In that case it was known that the vessel in which he sailed met with a violent storm the night after she left *Singapore*. She was never heard of again, and several other vessels were lost in the same storm.

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(1) W. N. 1873, p. 167.
(2) Law Rep. 5 Ch. 139.
(3) Law Rep. 5 Ch. 149.
(4) 2 M. & W. 894.

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(1) W. N. 1873, p. 167.

(2) Law Rep. 6 Ch. 356.

(3) Law Rep. 6 Ch. 357.

(4) 2 M. & W. 894.

I have read and carefully considered the evidence in the present case, and I am unable to come to the conclusion that there is any proof of the time when *Alfred Rhodes* died. I can do nothing, therefore, but send the case back to the Chief Clerk for him to answer the inquiries. There is no reason to suppose that he will be able to do so, and it may probably be for the interest

(1) Law Rep. 6 Ch. 358. (2) Law Rep. 20 Eq. 136.

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of the persons who would have been the next of kin of the intestate at the different periods to come to some arrangement for the distribution of the fund. If they do so, I shall be prepared to give such directions to the administrator as will relieve him from responsibility.

Solicitors for all parties: *Jaques & Co.*, agents for *Lancaster & Wright, Bradford.*

W. L. C.

WALLASEY LOCAL BOARD *v.* GRACEY.

STIRLING, J.

1887

June 7;
July 22.

[1887 W. 1704.]

Public Nuisance — Action for Injunction—Local Authority—Right to sue—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *s.* 107 [*Revised Ed. Statutes, vol. xvii., p.* 556]—*Want of Parties—Attorney-General.*

The *Public Health Act*, 1875, enacts in sect. 107 that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, " cause any proceedings to be taken " against any person in any Superior Court of Law or Equity to enforce the abatement or prohibition of any nuisance under the Act :—

Held, that such proceedings must be ordinary proceedings known to the law, and that in the absence of special damage a local authority cannot sue in respect of a public nuisance except with the sanction of the Attorney-General by action in the nature of an information.

MOTION for injunction.

This action was brought by the Local Board of the District of *Wallasey* against *Robert Gracey*, the contractor for the corporation of *Birkenhead*, for an injunction to restrain him from depositing filth, dust, rubbish, and night-soil, and other noxious and offensive matter on any land or place within the Plaintiffs' district, and from conveying the same along any street within the Plaintiffs' district in such a manner as to allow any portion of the same to escape from the cart or other means whereby the same was conveyed.

The district of the Plaintiffs comprised several townships, some of which were, in reality, small towns. It had a population of about 30,000 and an area of about 3200 acres, and it lay to the north of and adjoined the borough of *Birkenhead*, which had a population of nearly 90,000.

The Defendant was a farmer who had for several years contracted with the corporation of the borough of *Birkenhead* for the removal of the ashpit refuse and night-soil from that borough, and who had recently become the tenant of a farm of 320 acres, called the *Model Farm*, situate within the Plaintiffs' district.

It appeared from the Plaintiffs' evidence that the Defendant had deposited in and spread over part of a field in his own occupation within the district of the Plaintiffs, and forty yards from a road, refuse and night-soil matter to the extent at times of forty cart-loads a day, giving off a stench dangerous to health, and further, that from the jolting of the carts filth in a partially liquid condition was spilt on the roads through which the carts proceeded. The Defendant did not deny that there was some slight smell when the refuse (which was mixed with dry ashes), was first spread; but he alleged that such refuse was immediately ploughed in. That when ploughed in there was no smell, and he denied that any filth was spilt during the carting, which was done at night, or that any nuisance had arisen from either cause.

Amongst the particulars which, according to sect. 91 of the *Public Health Act*, 1875, are to be deemed nuisances liable to be dealt with summarily in manner provided by the Act, is comprised (sub-sect. 4): "Any accumulation or deposit which is a nuisance or injurious to health."

By sect. 107 of the same Act: "Any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any Superior Court of Law or Equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties from or for the punishment of any persons offending against the provisions of this Act relating to nuisances, and may order the expenses of and incident to all such proceedings to be paid out of the fund or rate applicable by them to the general purposes of this Act."

The Plaintiffs now moved for an injunction in the terms mentioned above.

Hastings, Q.C., and *Bardswell*, in support of the motion:—

The 69th section of the *Public Health Act*, 1875, provides that "Any local authority with the sanction of the Attorney-General may . . . . take such proceedings . . . . as they may deem advisable" to prevent the pollution of watercourses.

The 107th section of the same Act, without saying anything about the sanction of the Attorney-General, empowers any local authority to "cause any proceedings to be taken . . . . to enforce the abatement or prohibition of any nuisance under this Act."

So that in the case of a nuisance coming within the definitions in sect. 91, such as the present, the sanction of the Attorney-General need not be obtained by any local authority. And it is only reasonable that this should be so. The reason why the presence of the Attorney-General is required in an ordinary case is that the rights of the public may be protected. But the local board is a body specially constituted in order to protect the rights of the public in certain respects. The duty is cast upon them by this Act of watching over the health of the inhabitants of their district and of causing the abatement of nuisances therein, and a mandamus might be issued to compel them to do so, to which the fact that they had not obtained the sanction of the Attorney-General would be no answer. The position of a private individual is entirely different. He is not the custodian of anybody's rights but his own, and so unless he can shew special damage, he must put the Attorney-General in motion.

In the case of *Nuneaton Local Board* v. *General Sewage Company* (1), which was a suit by a local board to restrain a public nuisance, and where there was no allegation of private injury, a demurrer on the ground that the Court could not restrain the infringement of a public right except at the instance or in the presence of the Attorney-General was overruled.

[As to the nature of the nuisance, they cited *Bishop Auckland Local Board* v. *Bishop Auckland Iron and Steel Company* (2).]

Buckley, Q.C., and *Fred. Smith*, for the Defendant:—

Under the *Public Health Act* the local authority is armed with immediate summary powers to put an end to any nuisance under the Act: See sects. 49, 50, as to the removal of filth and manure, and sects. 91 to 98, as to the removal of accumulations or deposits which are a nuisance or injurious to health; and by sect. 107, if in their opinion summary proceedings are inadequate they may "cause any proceedings to be taken" to enforce the abatement or prohibition of the nuisance. But there is nothing in this section to delegate to the local authority any power

(1) Law Rep. 20 Eq. 127.

(2) 10 Q. B. D. 138.

or authority previously vested in the Attorney-General, or to enable them to cause to be taken any proceedings of a new kind or different from those in use at the passing of the Act. The "proceedings" must be proper legal proceedings, such as are known to the law. There is here no allegation of special injury to the Plaintiffs themselves, and the action being to restrain a public nuisance, should have been instituted in the name of the Attorney-General, and as at present framed cannot be sustained: *Vestry of Bermondsey* v. *Brown* (1).

Hastings, in reply.

STIRLING, J.:—

This is a motion on behalf of the Local Board of *Wallasey*, acting under the powers conferred by the *Public Health Act*, to restrain what is alleged to be a public nuisance. It is not alleged, as I understand it, that the local board have, themselves, suffered any special or particular damage in connection with the alleged nuisance, and, that being so, the objection is taken that the action is wrongly framed, and that the Plaintiff ought to have been the Attorney-General on the part of the public. On the other hand, it is said that the *Public Health Act* of 1875, s. 107, enables the local board to bring this action in their own name. That section is in these terms:—[His Lordship then read the section, and continued:—] Now, the particular nuisance which it is sought to abate is one of those mentioned in sect. 91 of the Act, sub-sect. 4, and I assume that it is the opinion of the local board that the summary proceedings which they are allowed by the Act to take at their own risk and in their own name would afford in this case an inadequate remedy. Then what is the power which is conferred upon them by sect. 107? The power is to "cause any proceedings to be taken against any person in any superior Court of Law or Equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties from or for the punishment of any persons offending against the provisions of this Act relating to

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(1) Law Rep. 1 Eq. 204, 212.

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nuisances." That is to say, they are entitled to take such proceedings as are known to the law for the purpose of obtaining that abatement or prohibition of the nuisance. Now, is this a proceeding which is known to the law, or which the law sanctions in the ordinary course in respect of the matter which is complained of? Certainly not; because it is well settled that no person can sue in respect of a public nuisance, except, either the Attorney-General, or a person suffering particular damage. Therefore, it seems to me that *primâ facie* this does not fall within the class of proceedings which the board are authorized to take. They may, if they see fit, go to the Attorney-General, represent to him that the nuisance is a public one, and then, if the mode of proceeding receives his sanction, they may bring an action in the nature of an information and claim the injunction which they ask. If he does not sanction that mode of proceeding, then they must adopt some other mode of proceeding known to the law in order to enforce the abatement or prohibition of the nuisance. That is the way in which the matter strikes me irrespective of any authority. Only two authorities have been cited which have any bearing on the case. The first is *Vestry of Bermondsey* v. *Brown* (1), in which there was a power given by a certain local Act "in all cases where the person stopping up any such landing-places or rights of way would be liable to an indictment, to indict any person who should stop or impede any such landing-place or rights of way, and to take such other proceedings for the opening thereof as should appear to the Commissioners expedient." They, in their own name, brought an action to restrain certain persons from stopping up a certain right of way, and then it was suggested that this was a public way, and thereupon it was pointed out by the Court that that being so, the proceedings ought to have been instituted by information by the Attorney-General. Then that was sought to be got over by the section of the Act which I have just referred to, but Sir *J. Romilly*, M.R., says (2): "I thought at the time, and further examination of the Acts of Parliament tends to confirm that view, that it was not intended by those Acts, or by any clauses to be found in them, to delegate to the commissioners named in the first Act, or to

(1) Law Rep. 1 Eq. 204.

(2) Law Rep. 1 Eq. 212.

the vestry, who have now delegated to them the powers conferred on the commissioners, any powers or authorities previously vested in the Attorney-General, and that, accordingly, if the vestry indict anyone under that Act, they must proceed in the name of the Queen before a grand jury, who must find a bill before it can be tried; and if they apply to the Court of Chancery, it must be with the name of the Attorney-General as plaintiff in an information." That appears to be applicable here. It does not appear to me to follow by necessary implication from the language of sect. 107 that because the local authority are authorized to "cause any proceedings to be taken in any Superior Court of Law or Equity to enforce the abatement or prohibition of any nuisance under this Act," it was intended to delegate to them any of the powers and authorities which were previously vested in the Attorney-General. The meaning rather was that when it became necessary in the judgment of the local authority to resort to proceedings other than those summary proceedings which are authorized by the Act, they should adopt the ordinary course, and submit their views to the Attorney-General, who no doubt would at once sanction the use of his name in case it should appear on the statement of the local board a proper case for interfering in that way. Then the other case is the case of *Nuneaton Local Board* v. *General Sewage Company* (1) before Vice-Chancellor *Bacon*. Now that case was one of contract, and, upon the statements in the bill, there was a distinct interference with the property of the plaintiffs. The defendants had contracted to remove the sewage, and to do it in a way defined by agreement entered into between the parties. Instead of doing that, according to the allegations in the bill, they adopted another plan, by which they removed part only and sent all the rest of the sewage, which they were bound to remove, into the sewers and drains belonging to the plaintiffs. Upon that the Vice-Chancellor held that the local board had a clear case for relief. The question was no doubt argued as to whether the Attorney-General ought not to be a party to the suit, and the case of *Vestry of Bermondsey* v. *Brown* (2) was there referred to, and the Vice-Chancellor leaves it an open question as to whether,

(1) Law Rep. 20 Eq. 127, 133.

(2) Law Rep. 1 Eq. 204.

supposing the case be similar to that of *Vestry of Bermondsey* v. *Brown* (1), the suit can be maintained without the consent of the Attorney-General. But then he goes on to say (2), "Upon the allegations in this bill, the plaintiffs are, in my opinion, entitled to sustain a suit in this Court." No doubt he afterwards granted an injunction restraining a nuisance, but upon the allegations of the bill, assuming they were proved by the evidence which was before the Court upon the motion, the plaintiffs would still be entitled to an injunction; for the sending back of the sewage and other refuse matters into the sewers and drains of the plaintiffs, which were their own property, was no doubt a particular damage in respect of which they would be entitled to sue. It does not seem to me, therefore, that the case of the *Nuneaton Local Board* v. *General Sewage Company* is one which is an authority for the proposition for which it is cited.

Mr. *Methold* (as *amicus Curiæ*):—The Attorney-General was subsequently made party to that action. A nuisance was afterwards made by turning the sewage into the river, and then we made the Attorney-General a party and got the injunction.

STIRLING, J.:—That being the state of the authorities, and having regard to the language used in the *Public Health Act*, I think the local board are simply entitled to take ordinary and proper proceedings for bringing the matter of which they complain before the Court. Therefore the objection as to want of parties is well founded, and must prevail, and the motion must stand over with leave to amend if they think fit in that respect.

1887. July 22. The local board in consequence of this decision applied for and obtained the authority of the Attorney-General to use his name as Plaintiff at their relation, and now renewed their motion for an injunction.

Hastings, Q.C., and *Bardswell*, in support of the motion.

Buckley, Q.C., and *Fred. Smith*, for the Defendants, *contrà*.

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(1) Law Rep. 1 Eq. 204.

(2) Law Rep. 20 Eq. 133.

STIRLING, J. 1887 WALLASEY LOCAL BOARD *v.* GRACEY.

In the result,

STIRLING, J., held it to be proved that at times there was a substantial nuisance, and granted the injunction asked for until the trial of the action.

Solicitors: *Jaques & Co.*, agents for *Layton & Steel, Liverpool; Wynne, Holme, & Wynne*, agents for *Simpson & North, Liverpool.*

W. W. K.

STIRLING, J. 1887 *April* 26, 27, 28; *May* 3, 4, 5; *July* 26.

In re TRUFORT.
TRAFFORD *v.* BLANC.

[1881 T. 527.]

Jurisdiction—Nationality—Foreign Subject—Succession to Property—Decision of Foreign Tribunal—Swiss Court at Zurich—Comity of Courts—Naturalization Act, 1870 (33 *&* 34 *Vict. c.* 14), *s.* 6 [*Revised Ed Statutes, vol. xvi., p.* 271].

Although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which he was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and may in such a case be bound to ascertain as best they can who according to the law of the domicil are entitled to the estate, yet where the title has been adjudicated upon by the Courts of the domicil, such adjudication is binding upon and must be followed by the Courts of this country (*Enohin* v. *Wylie* (1) *Ewing* v. *Orr Ewing* (2) *Doglioni* v. *Crispin* (3)); even if the judgment of the foreign Court has by the default of the party complaining of the judgment proceeded on a mistake as to the English law (*Castrique* v. *Imrie* (4) *Godard* v. *Gray* (5)), or the whole of the facts were not before the foreign tribunal (*De Cosse Brissac* v. *Rathbone* (6)); for the Courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal is wrong, recourse must be had to the mode of appeal provided in the foreign country (*Bank of Australasia* v. *Nias* (7)).

A testator who was by birth a British subject, and was the father of the Plaintiff, went to reside in *Switzerland*, and in the year 1842 acquired the

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(1) 10 H. L. C. 1.
(2) 10 App. Cas. 453.
(3) Law Rep. 1 H. L. 301.
(4) Law Rep. 4 H. L. 414.
(5) Ibid. 6 Q. B. 139.
(6) 6 H. & N. 301.
(7) 16 Q. B. 717.

"*Landrecht*" or "*Indigenat*" in the canton of *Zurich*, without being required to renounce his English nationality, which in the then state of English law he could not have effectually done; and he thereby became of Swiss nationality. With the sanction of the cantonal authorities he could have relinquished this "*Landrecht*" or "*Indigenat*," but he never effectually did so, although he afterwards left *Switzerland* and went to reside in *France*, where he died with a French domicil in the year 1878:—

Held, that the 6th section of the *Naturalization Act*, 1870, applied to the testator; that at the time of his death he was a Swiss, and not a British subject; and that, having regard to the French law, under which the Swiss tribunals were the proper forum, the Courts of *Zurich* had jurisdiction to decide upon the right of succession to his personal estate:—

Held, also, that notwithstanding an attempted disposition by the testator of the whole of his personal estate in favour of a stranger, the Plaintiff was, in accordance with a judgment of the Courts of *Zurich*, entitled as the testator's only child to nine-tenths of such estate as his compulsory portion.

THIS was an action to have the judgment of a Swiss Court enforced in this country, and for a declaration that the testator, *Francis Clement Trafford Trufort*, died in *France* a Swiss subject, and that his estate ought to be administered in accordance with the law of *France*.

The Plaintiff *François Guillaume Clément Trafford* claimed to be the legitimate son of the testator, who died in *France* in the year 1878, having by his will (which made no mention of the Plaintiff) given all his property to his godson, the Defendant, *J. A. F. Henri Blanc*, whom he constituted his executor.

The testator died possessed of considerable personal estate, which was locally situate in *England*, *Switzerland*, *Italy* and elsewhere. The Plaintiff alleged by his pleadings that the testator was a Swiss subject domiciled in *France* at the time of his death; that according to the law of *France* the succession to his estate was governed by the law of *Switzerland*; that under that law he, the Plaintiff, was entitled to nine-tenths of the testator's personal estate as his compulsory portion, and that to that extent the disposition attempted to be made by the will of the testator was inoperative, so far as it would defeat the Plaintiff's right to such portion.

The facts of the case, so far as is material for the purposes of this report, were shortly as follows:—

The testator was born at *Lakenham*, in the county of *Norfolk*, in the year 1792, and was consequently by birth a British subject. He left *England* in the year 1816, and never afterwards returned, except on short visits. He was originally named *Clement Trafford*, but in or about the year 1840 he assumed the additional Christian name of *Francis* and the additional surname of *Trufort*, and thenceforth generally called himself *Francis Clement Trafford Trufort.*

For some time previously to 1821 the testator was resident at *Naples*; and the Plaintiff, who was born there on the 8th of March, 1821, was admitted to be the son of the testator by a Neapolitan woman named *Carmela Pedata.* There was no certicate or direct evidence of their marriage, but there was the evidence of an aged witness named *Lorenzo Foglia* to the effect that the testator and *Carmela Pedata* lived openly together as husband and wife in the years 1819 to 1821; and the civil register of births kept at *Naples* contained an entry, signed by the testator, of the birth of the Plaintiff on the 8th of March, 1821, wherein the testator declared that the Plaintiff was born to him of Signora *Carmela Pedata* "*sua moglie legittima,*" *i.e.* his lawful wife; while the register of baptisms at *Naples* for the corresponding time contained an entry of the Plaintiff's baptism, in which he was described as the son of the testator and *Carmela Pedata*, "*conjugi,*" *i.e.*, man and wife; and this evidence was before the District Court of *Zurich* when that Court delivered the judgment of the 5th of February, 1884, hereinafter mentioned.

The testator and *Carmela Pedata* ceased to live together some time after the birth of the Plaintiff, who, so far as appeared from the evidence, was from his earliest years maintained and educated by the testator. In 1829 the testator took up his residence in *Lausanne*, in *Switzerland*, and there the Plaintiff continued to reside with him down to March, 1840. In that month the Plaintiff left his father and went to *Hamburg*, and the father and son did not appear to have subsequently lived together, though they maintained, with some considerable interruptions, a correspondence by letter.

On the 5th of May, 1840, the testator intermarried with one *Caroline Schulthess*, a native of the canton of *Zurich.* By her he had one child, a son named *Gustav*, who was born in 1844.

On the 12th of June, 1842, the testator was, on his own petition, admitted a citizen of the commune of *Riesbach* in the canton of *Zurich*, and on the 25th of August following the governing council of the canton granted him upon his own petition the right of naturalization in the canton, and at the same time sanctioned his being admitted to the right of citizenship in the commune of *Riesbach*.

The exact effect of these proceedings was in dispute. On the one hand the Plaintiff contended, and produced the evidence of five Swiss lawyers to shew that under the circumstances the testator had acquired the "*bürgerrecht*" of *Reisbach* and a Swiss "*landrecht*," and had thus become a naturalized Swiss, and the Plaintiff further contended that inasmuch as the testator did not, after the passing of the *Naturalization Act*, 1870, make a declaration of British nationality in accordance with sect. 6 of that Act, he had previously to his death ceased to be a British subject, and had become a Swiss by nationality.

On the other hand the Defendant contended and produced the evidence of two Swiss lawyers, Dr. *Locher* (who had acted as the legal adviser of the testator in his lifetime, and of the Defendant since his death), and Mr. *Tondury*, to shew that all that the testator had acquired was an "*indigenat*," and that in the year 1842 a foreigner could acquire a Swiss "*indigenat*" without losing or renouncing his native nationality, and could relinquish or renounce the "*indigenat*," when acquired, at his own pleasure. The conclusions which the learned Judge drew as to the effect of the evidence on this point will appear in his judgment.

On the 4th of June, 1853, the testator and *Caroline Schulthess* were divorced by a judgment of the District Court of *Zurich*; and in the following year the testator went to reside at *St. Julien*, a village not far from *Geneva*, but situated in *Upper Savoy*, which at that time formed part of the kingdom of *Sardinia*, but which in 1859 was ceded to *France*. There, in 1855, the testator's son *Gustav* died and was buried, and there the testator continued to reside down to his own death in 1878.

It was not disputed that the testator's domicil at the time of his death was French, and that according to the law of *France* the right of succession to the personal estate of a foreigner (as the testator was in *France*) is governed by the law of his nationality; and the Plaintiff produced evidence to shew that under a treaty concluded between *France* and *Switzerland* in the year 1869 the rights of the parties claiming to share in the estate of a Swiss subject dying domiciled in *France* were to be determined according to the law and by the tribunals of *Switzerland*.

Shortly after the death of the testator litigation commenced between the Plaintiff and the Defendant in the Courts of *Switzerland* and *Italy* with reference to the legitimacy of the Plaintiff and his rights to a portion of the property of the testator.

The litigation in *Switzerland* commenced in the year 1879, and proceeded with varying results. The Plaintiff not being at the outset in possession of some of the evidence he afterwards adduced, was at first unsuccessful, and his claim was rejected by the District Court of *Zurich* on the 25th of March, 1882. On the 30th of August, 1882, the Defendant successfully applied to the Court of first instance at *St. Julien* in *France* to have this judgment of the District Court of *Zurich* declared executory in *France*. However, upon the discovery and production by the Plaintiff of fresh evidence, the District Court of *Zurich* on the 5th of February, 1884, granted revision of their former judgment, and declared that the Plaintiff, as the lawful son of the testator, was entitled to nine-tenths of the testator's estate as the compulsory portion due to him.

The Defendant appealed from this judgment, and on the 19th of May, 1885, the *Zurich* Court of Appeal, after deciding that the evidence newly adduced in the Court of first instance was such as to render a revision of the former judgment necessary, held that the question of the "family rights" or "*status*" of the Plaintiff was to be decided according to English law; and that according to that law a presumption of legitimacy arose from the fact that the parents of a child in recording its birth in the register of births or of baptisms had described the child as lawful and themselves as husband and wife. So that the burthen of proof did not lie upon the child to prove his legitimacy, but upon the party who disputed it to prove his illegitimacy. From this basis the Court came to the conclusion that the entries in the Neapolitan registers of birth and baptism coupled with other evidence afforded sufficient proof of the legitimacy of the Plaintiff, subject to evidence to the contrary being given; and that the Defendant had failed to adduce such proof to the contrary; and the decision of the Court of first instance in favour of the Plaintiff was affirmed.

An appeal from this decision to the Court of Cassation was dismissed on the 4th of December, 1885, and two subsequent applications by the Defendant to obtain from the Court of Appeal in *Zurich* rescission of the judgments of the 5th of February, 1884, and the 19th of May, 1885, upon production of fresh evidence, were rejected, as was also an application made by him on the 7th of February, 1887, to the Court of Cassation for the amendment of their judgment.

This concluded the litigation between the parties in the Swiss Courts, and there was in evidence a certificate of the Supreme Court of the canton of *Zurich* that the judgment of the Court of Appeal of the 19th of May, 1885 (affirming that of the District Court of the 5th of February, 1884) was legally valid and executable, inasmuch as the application for nullity brought against it was rejected by the Court of Cassation on the 4th of December, 1885, and no other kind of opposition, appeal, or other legal means was admissible or existed.

Contemporaneously with these proceedings in *Switzerland*, litigation between the same parties was prosecuted in *Italy*. By a judgment of the Court of Appeal at *Lucca*, given on the 20th of July, 1885, it was held (1) that the testator was at the time of his death a naturalised Swiss, and that the right of succession to his personal estate was governed by the law of *Zurich*; (2) that the judgment of the *Zurich* Court of Appeal of the 19th of May, 1885, constituted an adjudication on the legitimacy of the Plaintiff to which regard must be had by foreign tribunals; (3) that as the testator was an English subject at the time of the Plaintiff's birth the Plaintiff's legitimacy was to be determined according to English law; and (4), and that according to that law, whether regard was had to the decision of the Court of *Zurich*, or to the evidence adduced in the case, the

Plaintiff's legitimacy was made out, and he was entitled, according to the law of *Zurich* to nine-tenths of the personal estate.

On the 30th of March, 1886, an appeal from this decision to the Court of Cassation was dismissed.

On the 3rd of May, 1886, an application was made by the Defendant to the Court of Appeal of *Lucca* to revoke their former judgment, on the ground of their discovery of fresh evidence, including a certificate of the death of *Carmela Pedata* (described as the wife of an Italian named *Angelo Pesce*) on the 8th of January, 1864, and also on the ground of fraud.

This application, after being argued, was refused on the 15th of July, 1886, mainly on the ground that it was not made within the time prescribed by Italian law.

During this litigation and at the hearing of the present action the Defendant relied on the fact that in the year 1840 the testator had married *Caroline Schulthess*, which marriage he contended shewed that there had been no previous marriage with *Carmela Pedata* as alleged by the Plaintiff, seeing that the Plaintiff had not proved the death of *Carmela Pedata* before 1840, and that if she were not then dead the second marriage of the testator would have been bigamous; and he adduced evidence to shew that in 1825 *Carmela Pedata* married *Angelo Pesce*, and that this marriage was made with the knowledge of the testator. The Defendant also contended that if the testator ever acquired a Swiss nationality he abandoned it in 1856 when he left *Switzerland* and took up his permanent abode in *Savoy*, which then belonged to the kingdom of *Sardinia*, but at the time of the testator's death was French territory.

Everitt, Q.C., and *Curtis Price*, for the Plaintiff:—

The testator was naturalised in *Switzerland* in 1842, and took no step after the passing of the *Naturalization Act*, 1870, to retain his British nationality; he accordingly became a Swiss subject. He continued to be a Swiss subject, and was such at the time of his death; and by the operation of the Franco-Swiss Treaty he and the succession to his estate were amenable to the jurisdiction of the Swiss Courts. The Swiss Courts, viz., those of *Zurich*, have decided that the testator was a Swiss subject, and that the Plaintiff was his legitimate son, and is entitled to nine-tenths of his estate. And according to the comity of Courts that decision will be adopted and followed by the Courts of this country, who will treat the matter as *res judicata*.

It will be said that the foreign Courts decided the case upon a mistaken view of the weight attached by the English Courts to the presumption in questions of legitimacy. But even if this were true, which we do not admit, the English Courts would be equally bound by the judgment of the foreign Court: *Castrique* v. *Imrie* (1); *Godard* v. *Gray* (2); *Schibsby* v. *Westenholz* (3); *In re May* (4); *Henderson* v. *Henderson* (5); *De Cosse Brissac* v. *Rathbone* (6); *Castrique* v. *Behrens* (7); *Messina* v. *Petrococchino* (8). Again, the judgment was a judgment given in an action to which both the Plaintiff and Defendant were parties, and which was fought out between them both in the Swiss Courts of first instance and of appeal.

Doglioni v. *Crispin* (9) shews what weight is attributable to a judgment of the Court of the domicil. A judgment on a subject of personal *status* is a judgment *in rem*, and is binding even on third parties: *Brett*, L.J., *Niboyet* v. *Niboyet* (10).

There is nothing to entitle the Defendant to repudiate the judgments of the *Zurich* Courts. He himself enforced the *Zurich* judgment so long as it was in his own favour, at the Court of *St. Julien* in *France*.

If it is requisite to argue the question of legitimacy, the certificates of birth and baptism and the treatment of the Plaintiff by his father are strong evidence in favour of his legitimacy: *Slaney* v. *Wade* (11); *Lord Braybroke* v. *Inskip* (12); *Monkton* v. *Attorney-General* (13). The statutes validating foreign marriages, 4 Geo. 4, c. 91, and 12 & 13 Vict. c. 68, s. 20, were relied on by the foreign Courts, and we rely on them here. We also claim as authorities in our favour on this point: *Piers* v. *Piers* (14); *De Thoren* v.

(1) Law Rep. 4 H. L. 414, 427, 445.
(2) Ibid. 6 Q. B. 139.
(3) Ibid. 155.
(4) 25 Ch. D. 231.
(5) 6 Q. B. 288, 298.
(6) 6 H. & N. 301.
(7) 30 L. J. (Q.B.) 163.
(8) Law Rep. 4 P. C. 144.
(9) Ibid. 1 H. L. 301.
(10) 4 P. D. 1, 12.
(11) 1 My. & Cr. 338, 357.
(12) 8 Ves. 417, 429, 430.
(13) 2 Russ. & My. 147.
(14) 2 H. L. C. 331.

Attorney-General (1); *Lyle* v. *Ellwood* (2); *Whicker* v. *Hume* (3); *Marriott* v. *Hampton* (4); *Geyer* v. *Aguilar* (5).

Hastings, Q.C., and *Nasmith*, for the Defendant:—

The argument for the Plaintiff assumes a *primâ facie* case of legitimacy in his favour, which it lies on us to rebut. This is not so. The facts on both sides must be looked at and dealt with as a whole by the Court in this country, for the whole of the facts were not before the Swiss Court at the time it delivered the judgment of the 25th of May, 1885, which is sought to be enforced in this action, nor in fact until October, 1886: *Andrewes* v. *Uthwatt* (6). The result might have been different if all the facts had been before the Court in May, 1885.

[STIRLING, J.:—They were all brought before the Court, and unsuccessfully, by your client on a subsequent occasion.]

Our Courts have never hitherto accepted as final the judgment of a foreign Court upon a question of marriage: *Sinclair* v. *Sinclair* (7), and there is here the further circumstance that neither of the persons whose marriage was in question were subjects of the country the Courts of which gave the decision. Such Courts therefore can hardly be said to be the proper *forum* for the purpose: *Westlake* on International Law (8); *De Mora* v. *Concha* (9); *Abouloff* v. *Oppenheimer* (10).

Indeed their incompetency to decide the question was admitted by the Court of Appeal at *Zurich* in the judgment of the 5th of February, 1884, on the ground that they had no machinery of their own, but must go to the French law.

The Swiss Court accordingly had no jurisdiction, and there is no judgment of a competent foreign tribunal such as this Court will regard or enforce. The proper Courts to determine the nationality of a British subject are the Courts of this country.

Naturalization cannot be conferred except by a nation, and the canton of *Zurich* not having the power of declaring war or

(1) 1 App. Cas. 686, 689.
(2) Law Rep. 19 Eq. 98.
(3) 13 Beav. 366.
(4) 7 T. R. 269.
(5) Ibid. 681.
(6) 2 Times L. R. p. 895.
(7) 1 Hag. Con. 294, 297.
(8) Ed. 1880, p. 319.
(9) 29 Ch. D. 268.
(10) 10 Q. B. D. 295.

making peace is not a "foreign state" within the meaning of the 6th section of the *Naturalization Act*, 1870 (33 & 34 Vict. c. 14): *Phillimore's* International Law (1); *Wheaton's* International Law (2). Consequently the testator never ceased to be a British subject.

Everitt, in reply, cited on the question of legitimacy, *In re Goodman's Trusts* (3); *Hervey* v. *Hervey* (4); *Goodman* v. *Goodman* (5); and as to the independence and sovereign character of the Swiss cantons, *Wheaton's* International Law (6).

1887. July 26. STIRLING, J. (after fully stating the facts of the case, continued):—

The Plaintiff alleges that the judgment of the Court of *Zurich* of the 19th of May, 1885, is a judgment *in rem*, binding on the Defendant, and is conclusive in this country, and ought to be enforced by the Court, and he seeks to have it enforced accordingly, and I have now to determine what effect ought to be given by an English Court to this judgment. The law on the subject is thus stated by Lord *Westbury* in *Enohin* v. *Wylie* (7): "I hold it to be now put, beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the Judge of the domicil. It is the right and duty of that Judge to constitute the personal representative of the deceased. To the Court of the domicil belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the Judge of the domicil. In short, the Court of the domicil is the *forum concursus* to which the legatees under the will of a testator or the parties entitled to the distribution of the estate of an intestate are required to resort." This statement of the law has not in its entirety met with complete acceptance, and in particular it has been more than once criticised by Lord *Selborne*, whose views are perhaps most fully stated in the case of *Ewing* v. *Orr Ewing* (1): "So far as relates to domicil, it has always appeared to me to be clear, that the domicil of a deceased testator or intestate cannot, in principle, furnish any governing or necessary rule, except for the purpose of determining the succession to moveable estate. For that purpose, recourse must be had, not always or necessarily to the Courts but, always and necessarily to the law of the domicil. The succession being once ascertained, the rights resulting therefrom belong to, and follow the person of, the living successor; and not the dead predecessor. It has never been held that the *forum*, in which such rights may be vindicated, depends on the domicil (as distinguished from the place of residence for the time being, which is sometimes inaccurately so denominated) either of the plaintiff or of the defendant, in any action or suit; and if the domicil of the living man, whose rights and liabilities are in question, is for that purpose immaterial, I am unable to understand how the place in which those rights are to be protected, or those liabilities enforced, can necessarily depend upon the domicil of the deceased." His Lordship then refers to the opinion expressed by Lord *Westbury* in *Enohin* v. *Wylie* (2), to which I have already alluded, as being unsupported by any other authority and inconsistent with the general tenor of the English, Scotch, and American cases, and notices that both Lord *Cranworth* and Lord *Chelmsford* dissented from Lord *Westbury*, the former saying in his judgment (3), "The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicil."

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(1) 2nd Ed. vol. i., pp. 152, 380; 3rd Ed. pp. 183, 446.

(2) 2nd Ed. p. 109.

(3) 17 Ch. D. 266, 293.

(4) 2 W. Bl. 877.

(5) 28 L. J. (Ch.) 745.

(6) 6th Ed. pp. 80, 81.

(7) 10 H. L. C. 1, 13.

The next authority bearing on the subject is that of *Doglioni* v. *Crispin* (4), and in that case Lord *Cranworth* (5) expresses himself thus: "No principle can be better established than that the administration of the personal estate of a deceased person belongs exclusively to the country in which he is domiciled at his death. The Courts of that country must decide who is entitled, and from their decision there can be no appeal. It does not always happen, as is the case here, that the claim of the party litigating in our Courts has been actually raised and decided in the Courts of the country of the domicil. It is, therefore, often matter of necessity that our Courts should receive evidence from learned foreigners as to what the law of the domicil is. Such evidence is in general far from satisfactory, but it often happens that no better evidence can be obtained, and then the Courts here must ascertain, from conflicting testimony, as well as they can, what the law is on which they must act. But here we are left in no doubt. The title of the respondent has been fully adjudicated upon by the Courts of his domicil after long and careful consideration, and by their decision we are bound."

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(1) 10 App. Cas. 453, 502.

(2) 10 H. L. C. 1, 13.

(3) 10 H. L. C. 19.

(4) Law Rep. 1 H. L. 301.

(5) Law Rep. 1 H. L. 314.

The rule to be extracted from these cases appears to be this, that although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which the deceased was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such case may be bound to ascertain as best they can who, according to the law of the domicil, are entitled to that estate, yet where the title has been adjudicated upon by the Courts of the domicil, such adjudication is binding upon, and must be followed by, the Courts of this country.

It is contended that this rule applies to the present case. It is indeed admitted that the domicil of the testator was French, but according to the law of *France* (as stated by the Defendant's own witnesses) the right to his succession depends on his nationality. That nationality it is said was Swiss, and by virtue of the treaty between *France* and *Switzerland* in 1869 the right of succession falls to be determined by the tribunals of *Zurich*, who have decided in favour of the Plaintiff. It is obvious that this argument cannot prevail unless the testator's nationality was Swiss, and this is a point which at the trial was made the subject of considerable argument and which demands close examination. [His Lordship then stated in detail the evidence on this point, and continued:—]

In this state of the evidence, I conclude—

1. That at the time when the testator acquired the "*landrecht*" in *Zurich* he was not required formally to renounce his English nationality, and indeed, if he had been so required, he could not in the then state of English law have effectually done so as between himself and the government of this country, though it may be a question whether regard ought to be had to that in administering his estate according to the law of his domicil, *i.e.*, *France*.

2. That the "*landrecht*" or "*indigenat*" could only be relinquished with the sanction of the cantonal authorities: and that, in the case of the testator, it never was effectually relinquished.

3. That there is no substantial difference between "*indigenat*" and nationality; any difference arises solely from the fact that down to 1848 the Swiss cantons constituted a group of independent states united by federation for certain purposes.

These conclusions are substantially those arrived at by the Court of Appeal at *Lucca* in their judgment of the 20th of July, 1885, and rest on similar reasons.

Under these circumstances I think that sect. 6 of the *Naturalization Act*, 1870, applied to the testator, and that he was at the time of his death a Swiss and not a British subject.

The testator's nationality then being Swiss at the time of his death it follows that the *Zurich* tribunals are those which according to the law of the testator's domicil have jurisdiction to decide on the right of succession to his estate, and in fact they have at the instance of the Defendant been recognised as such by the Court of *St. Julien*.

This being so, I have here an advantage similar to that which the Court had in *Doglioni* v. *Crispin* (1), that the claim of the party litigating in this Court has been actually raised and decided in the Courts which according to the law of the testator's domicil were the proper and competent tribunals to decide on their rights. Those tribunals have decided that the Plaintiff is entitled to nine tenths of the testator's personal estate, of which the funds which form the subject-matter of the present action are part, and in accordance with the principle laid down in *Doglioni* v. *Crispin*, I consider that I am bound by their decision.

(1) Law Rep. 1 H. L. 301.

Various objections have, however, been raised to this decision, and on them it may be right that I should say a few words.

First it is said that the decision is founded on English law, and that the foreign tribunals have taken an erroneous view of our law.

The complaint in substance is to this effect. It was not contended that according to English law the entries of birth and baptism in the civil and ecclesiastical registers kept at *Naples* are inadmissible as evidence; and in fact upon the evidence given by the Defendant's Italian expert witnesses it would seem that both registers were public documents kept by public officers within the meaning of the rule laid down by Lord *Blackburn* in *Sturla* v. *Freccia* (1), and consequently both entries were admissible. It was said, however, that an improper weight was attached to these documents, that the tribunal dealt with them as establishing a *primâ facie* case on behalf of the Plaintiff which it was incumbent on the Defendant to displace, whereas the true mode of dealing with the evidence was that indicated by Mr. Justice *Chitty* in *Andrewes* v. *Uthwatt* (2): "To his Lordship's mind it was an erroneous mode of trying such a case as that before him by picking out a few facts and isolating them, and thus to endeavour to raise from them a presumption of marriage, and then challenge the other side to produce evidence to the contrary, at the same time arguing that the other side was required by law to produce so strong a case as to render it reasonably impossible that a marriage did take place. The proper mode was rather to take the evidence as a whole and thus to see whether the presumption of marriage was sufficiently rebutted."

To this it was answered that there was nothing in the proceedings of the foreign Courts so inconsistent with English law as to render it improper to recognise or enforce their judgments in this country; and that in truth and substance the *Zurich* Court of Appeal did in the judgment of the 2nd of October, 1886, deal with all the facts, and arrive at an honest and *bonâ fide* conclusion adverse to the Defendant. This observation appears to be of considerable weight; but I do not consider it necessary to determine whether it is to any extent well founded; for it was further urged, and it seems to me correctly, that it is established by the decisions in *Castrique* v. *Imrie* (1) and *Godard* v. *Gray* (2) that a foreign judgment cannot as between the same parties be impeached in this country on the ground that it proceeded on a mistake as to the English law; at all events, if the party who seeks to impeach the judgment has failed to bring to the knowledge of the foreign tribunal the provision of the English law on which he relies.

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(1) 5 App. Cas. at pp. 623, 643–4.

(2) 2 Times L. R. 897.

In the former case, *Blackburn*, J., in advising the House of Lords says (3): "We think . . . that all that can be required of the tribunal that has to decide on a question of foreign law is that it should receive and consider all the evidence as to what the foreign law is, and *bonâ fide* determine on that as well as it can." And Lord *Hatherley* says (4): "Without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own which has been cited, in the case of *Simpson* v. *Fogo* (5), as to what might be done in the case of a Court wilfully determining that it will not, according to the usual comity, recognise the law of other nations when clearly and plainly put before it, without saying anything as to what would justify the Courts in our own country in hesitating to give effect to a foreign judgment if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion, that, in this case, the whole of the facts appear to have been inquired into by the French Courts judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in *France* in deciding as they did decide."

Then Lord *Colonsay* says (6): "It appears to me that we cannot enter into an inquiry as to whether the French Courts proceeded correctly either as to their own course of procedure, or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question

(1) Law Rep. 4 H. L. 414.
(2) Ibid. 6 Q. B. 139.
(3) Ibid. 4 H. L. 434.
(4) Law Rep. 4 H. L. 445–6.
(5) 1 J. & H. 18; 1 H. & M. 195.
(6) Law Rep. 4 H. L. 448.

is, whether under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship."

In *Godard* v. *Gray* (1), *Blackburn*, J., after citing the passage from Lord *Hatherley's* speech in the House of Lords already quoted, proceeds to examine certain *dicta* and opinions to the effect that the defendant in an action on a foreign judgment is at liberty to shew that the judgment was founded on a mistake, and he concludes this part of the judgment of himself and *Mellor*, J., as follows (2): "But we think it unnecessary to discuss this point, as the decisions of the Court of Queen's Bench in *Bank of Australasia* v. *Nias* (3), of the Court of Common Pleas in *Bank of Australasia* v. *Harding* (4), and of the Court of Exchequer in *De Cosse Brissac* v. *Rathbone* (5), seem to us to leave it no longer open to contend, unless in a Court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law." He then proceeds to discuss the doctrine laid down by the author of *Smith's* Leading Cases, "that if the judgment appears on the face of the proceedings to be founded on a mistaken notion of English law, it would not be conclusive;" and holds it to be not well founded. This view appears to have subsequently met with the approval of *Lush*, J. (*Schibsby* v. *Westenholz* (6)), and if it be well founded, the Defendant's objection fails. Sir *James Hannen*, however, did not agree. His Lordship says (7): "I do not think that any authority binds us, nor am I prepared to decide that a defendant not guilty of any laches, against whom a foreign judgment *in personam* has been given, is precluded from impeaching it on the ground that it appears on the face of the proceedings to be based on an incorrect view of the English law, even though there may be no evidence that the foreign Court, knowingly or perversely, refused to recognise that law. I do not, however, enter at length upon the consideration of this question, because I have arrived at the conclusion that the defendants in this case were guilty of

(1) Law Rep. 6 Q. B. 139.
(2) Ibid. 150.
(3) 16 Q. B. 717.
(4) 9 C. B. 661.
(5) 6 H. & N. 301.
(6) Law Rep. 6 Q. B. 159.
(7) Law Rep. 6 Q. B. 154.

laches. It does not appear upon the face of the proceedings, nor at all, that the French Court was informed of what the English law was. It was the duty of the defendants to bring to the knowledge of the French Court the provision of the English law on which they now for the first time rely, and having failed to do so, they must submit to the consequences of their own negligence. The French Courts, like our own, can only be informed of foreign law by appropriate evidence, and the party who fails to produce it cannot afterwards impeach the judgment obtained against him on account of an error into which the foreign Court has fallen, presumably in consequence of his own default." It appears to me that this applies to the present case. The Defendant did not, so far as appears, take any steps to bring before the *Zurich* tribunals evidence as to the English law on which he now relies, and having failed to do so he must take the consequences of the error (if such there be) into which these tribunals have fallen. On this view of the law (no less than on the former) the Defendant's objection fails.

It was said, however, that the whole of the facts were not before the *Zurich* Courts when the judgment of the 19th of May, 1885 (that relied on by the Plaintiff in his statement of claim), was given, and that the cases of *Castrique* v. *Imrie* (1) and *Godard* v. *Gray* (2) shew that all the facts must be brought before the foreign tribunal. In support of this argument the language of Lord *Hatherley* in *Castrique* v. *Imrie*, cited in *Godard* v. *Gray* (3), was relied on. His Lordship says: "The whole of the facts appear to have been inquired into by the French Courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in *France* in deciding as they did decide." I am of opinion, however, that the language of the very learned Judges, when fairly construed, does not warrant the conclusion sought to be derived from it; a conclusion which seems to me not to be in accordance with the decision in *De Cosse Brissac* v. *Rathbone* (4), in which the fifth plea was as follows (5): "And the defendants further say that the enforcement of the said judgment in *England* is contrary to natural justice on the following grounds: That since the hearing of the said suit in which the said judgment was pronounced, and after the pronouncing of the said judgment, the defendants have discovered fresh evidence which was not known to them, or either of them, before the pronouncing of the said judgment, and which, with reasonable diligence, they could not have discovered before the pronouncing of the said judgment, and which said evidence shews and proves that the said judgment is erroneous, in fact and law, on the merits."

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(1) Law Rep. 4 H. L. 414.

(2) Ibid. 6 Q. B. 139.

(3) Law Rep. 6 Q. B. 149.

(4) 6 H. & N. 301.

(5) 6 H. & N. 304, 308.

This plea was overruled, and Baron *Martin's* judgment was as follows: "We are all of opinion that this question is so concluded by the authorities that it is impossible for us to decide contrary to them, and the case must go to a Court of error. I may observe that the question does not come before me for the first time: for many years past I have had occasion to consider it."

Consequently this is a decision that a foreign judgment binds, notwithstanding the discovery of fresh evidence, and although the whole of the facts were not before the foreign tribunal at the time it delivered its decision. No reasons are given, but the grounds of the decision do not appear to be very far to seek. The principle on which *Bank of Australasia* v. *Nias* (1) was decided appears to be that the Courts of this country do not sit to hear appeals from foreign tribunals, and that if the judgment of a foreign Court is erroneous, the regular mode, provided by every system of jurisprudence, of procuring it to be examined and reversed ought to be followed. Neither do the Courts of this country sit to rehear causes which have been tried abroad. Every system of jurisprudence provides a mode by which a judgment may be reviewed and a cause reheard on the discovery of fresh evidence; and to the regular mode so provided recourse ought to be had, as in fact has been unsuccessfully done by the Defendant in the present case.

It was further said that the Courts of this country will not accept as conclusive the decision of a foreign Court as to the validity of a marriage, and in support of this proposition the case of *Sinclair* v. *Sinclair* (2) was relied on. Whether this

(1) 16 Q. B. 717.

(2) 1 Hag. Con. 294, 297.

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proposition be or be not well founded, it does not appear to me to apply, for this Court is not called upon to give effect to the decision of a foreign Court as to the validity of a marriage, but as to the right of succession to the estate of a testator. What the Swiss Court has decided is not the validity of the marriage of the testator and *Carmela Pedata*, but the right of the Plaintiff to a share of the testator's personal estate, although the decision may have been based on the existence and validity of such a marriage.

Lastly, it is said that the judgment of the *Zurich* Court of the 5th of February, 1884, if not contrary to natural justice shews at all events on the face of it an admission of incompetence to decide the question at issue, inasmuch as it is laid down that Swiss law contains no provisions applicable to the case, and consequently the Court had recourse to French law. I understand this simply to mean that, failing to find any express provisions in the Swiss law, the Court in arriving at its decision was guided by the French law, which is said to be on this subject the mother of modern law. In like manner our own Courts in the absence of express decision are sometimes guided by Roman law: *Acton* v. *Blundell* (1). But however this may be, it does not lie with the Defendant now to raise this objection, for it is stated that (whatever their motives may have been) both parties expressly consented to the application of French law.

I am of opinion, therefore, that effect ought not to be given to the Defendant's objections to the decisions of the Swiss tribunals and that those decisions are binding on this Court, and ought to be recognised and have effect given to them in the distribution of the testator's estate.

I shall accordingly declare that the judgment of the *Zurich* District Court of the 5th of February, 1884, affirmed by the *Zurich* Court of Appeal on the 19th of May, 1885, is and ought to be deemed and taken as of legal force and effect in this action; and that under or by virtue of the said judgment the Plaintiff is entitled to nine tenths of the testator's estate.

Solicitors: *Heales & Son; Frederick Rolt; Lambert, Petch & Shakespear.*

W. W. K.

(1) 12 M. & W. 324, 353.

ROWE v. SCHOOL BOARD FOR LONDON.

KEKEWICH, J.

1887

June 8, 9.

[1886 R. 1834.]

Vendor and Purchaser—Action for Specific Performance—Costs—Delay—Damages—Right of Way—Works.

The purchaser of a piece of land agreed, as part of the consideration, to grant within a given time to the vendor a right of way, and to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way or to make the road and sewers until long after the time fixed, and the vendor brought an action for specific performance and for damages, as the other land had remained unproductive until the road was made:—

Held, that judgment for specific performance with costs must be given but no damages, as the contract was for a sale of real estate; there being no distinction between a contract to grant a right of way and make a road and sewers, and a contract to sell real estate.

Principle on which in such a case damages would be assessed discussed.

By an agreement dated the 3rd of April, 1886, and made between *Elizabeth Davidson* (the vendor) of the one part, and the *School Board for London* of the other part, it was agreed: (1.) That the School Board should buy of the vendor for £3500 a piece of land at *Clapham*; (2.) That the School Board would, within three months, grant or cause to be granted by all necessary persons to the vendor and her heirs, and all persons authorized by her, full and free rights of way over an adjoining piece of land coloured blue on the plan annexed thereto, to the intent that there might be free and unrestrained access to the other adjoining lands of the vendor from *St. Luke's Road* and *Crescent Road*; (3.) That the School Board would, within one month after notice, make over the pieces of land coloured blue and brown on the plan a good carriage road with good and proper sewers connecting with the sewer in *Crescent Road*, and grant to the vendor and her heirs free use of such sewers. On the 30th of June, 1886, *Elizabeth Davidson* conveyed to the School Board the piece so agreed to be sold.

At the time when the agreement was made, the School Board had no title to the land coloured blue. It was afterwards bought by them and conveyed to them by one *Wright*. A claim to a part of the land was, however, set up by a builder named *Jenkins* under an agreement with *Wright*, and the School Board, on the 28th of September, 1886, brought an action of ejectment against *Jenkins*, who was in possession. The action was tried and decided in favour of the School Board, who obtained judgment, but not until after the present action was begun.

Notice to make the road and sewers was given on the 20th of April, 1886, but neither the road nor the sewers had been made, nor had the rights of way been granted when the action was brought.

W. Rowe and *W. Williams*, to whom *Elizabeth Davidson* had conveyed her remaining land and rights, brought this action on the 22nd of September, 1886, against the School Board, claiming specific performance and damages. As to the damages, the Plaintiffs alleged, as was the fact, that they had on the 21st of July, 1886, paid *Elizabeth Davidson* £16,000 for her land, and alleged that they intended to build thereon immediately, but it was not available for building unless and until the School Board performed their agreement as to granting rights of way and making the road and sewers. That the Plaintiffs had, in order to pay *Elizabeth Davidson*, borrowed £14,000, and had to pay £720 per annum interest thereon whilst the land remained unproductive.

Warmington, Q.C., and *Mulligan*, for the Plaintiffs:—

The Plaintiffs are clearly entitled to specific performance and to damages for their loss by the delay. This case is not like *Bain* v. *Fothergill* (1), and does not depend on a contract to sell land, but on a contract to make roads and sewers. Damages will be given where some special purpose is in the contemplation of the parties: *Cory* v. *Thames Ironworks and Shipbuilding Company* (2); *Jaques* v. *Millar* (3); *Wesley* v. *Walker* (4); *Hadley* v. *Baxendale* (5); *Engel* v. *Fitch* (6). Time was of the essence of the contract, and the precise time is pointed out. As to the amount of damages, £3500 was not the only price paid for the land, and the damages are not confined to interest on that, but are measured by the loss to the Plaintiffs.

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(1) Law Rep. 7 H. L. 158.
(2) 11 W. R. 589.
(3) 6 Ch. D. 153.
(4) 26 W. R. 368.
(5) 9 Ex. 341.
(6) Law Rep. 3 Q. B. 314; 4 Q. B. 659.

Barber, Q.C., and *A. Young*, for the Defendants:—

The contract here relates to land, and no damages are recoverable for loss in consequence of delay in completion: *Fry* on Specific Performance (1); *Hyam* v. *Terry* (2); *Lock* v. *Furze* (3). Damages cannot be given for the loss of expected profit. There has been no wilful misconduct by the Defendants, and they could not help the delay. In very few cases is the contract completed on the day. The School Board brought an action in order to be able to complete, which they were not bound to do: *Williams* v. *Glenton* (4).

Warmington, in reply:—

This is in fact an undefended case, and the only question is as to the damages. The Defendants professed to be in possession and to be able to make this road, and must pay the damage caused by their not being able to do so. Why did they not proceed sooner to eject *Jenkins*? There is in fact no excuse for the delay.

Kekewich, J., stated the facts of the case, and said that as the grant of the rights of way had not been executed, and the roads and sewers had not been made until long after this action had been commenced, the Defendants must submit to a decree for specific performance, with costs. They had not, though perhaps from no fault of their own, performed their contract, and as a matter of fact the action had provoked energy on their part. They must pay the costs quite apart from the question of damages, though probably the costs might have been given as damages if not as costs. The difficult question was whether the Plaintiffs were entitled to damages for the loss occasioned by the delay. The facts were few and simple, and there was no real dispute about them. The Defendants when they entered into the contract with the Plaintiffs did not disclose that there was any outstanding right in any other party to the land in question; but that was the usual course where the vendors have compulsory powers of obtaining land. It seemed that the outstanding right was not known at the time, but whether it was or not his Lordship was not surprised that the Board contracted as they did. They afterwards found that *Jenkins* claimed under an agreement, and this prevented the Board from completing. He put them to bring their action for recovery of possession, and set up his agreement. It turned out to be an unfounded defence, but he set it up, and the Board could obtain possession only by legal means. This was the real cause of the delay. It would have been useless for the Board to make the road and sewers only as far as they could on the land in their possession, and it would be idle to estimate the damages occasioned by their not having done so. His Lordship then proceeded:—It comes, therefore, to this. Are the School Board liable in damages because of their inability to perform their contract, that inability being occasioned by the possession of *Jenkins*? That of course is a question of law.

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(1) 2nd Ed. p. 553.
(2) 25 Sol. J. 371.
(3) Law Rep. 1 C. P. 441.
(4) Ibid. 1 Ch. 200.

The Defendants have insisted that the case comes within *Bain* v. *Fothergill* (1). It is therefore necessary to consider what that case decided. The report contains not only a statement of the facts, but the arguments of counsel, the advice of many eminent Judges, and the opinions of several Law Lords: all necessary and all useful, because at that time there was a considerable question whether what was then decided was really the doctrine of the Court. But that case was decided in 1874, and looking at it in 1887, when it has become familiar to all practitioners, it can be summed-up in very few words. I do not know that it can be summed-up better than by reference to the head-note, or by reference to Lord *Chelmsford's* judgment, which is the foundation for that head-note. He refers to what is stated in *Sedgwick* on Damages, and takes it as a statement of the law (2): "To this general rule there undoubtedly exists an important exception which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud and bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him with interest and expenses. In the latter, he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice." Lord *Chelmsford* says: "I quite agree that the distinction as to damages in cases of contracts for the sale of real estate, where the vendor acts *bonâ fide*, and where his conduct is tainted with fraud or bad faith, is not to be 'justified or explained on principle.'" Then in another paragraph he says: "I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." This doctrine being clearly, to my mind, applicable as much to a case where there has been delay as to a case where there has been non-performance, for which the case of *Hyam* v. *Terry* (1) is useful, although in my judgment not necessary, the question is whether this case comes within *Bain* v. *Fothergill* (2).

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(1) Law Rep. 7 H. L. 158.

(2) Law Rep. 7 H. L. 206, 207.

The answer on the part of the Plaintiffs is: "This is not a case of a sale of real estate, this is not a case of a failure of title to real estate, this is a case of construction of works. What the Defendants, the School Board, have contracted to do is to make certain roads, to construct certain sewers, and to give us a right of way over those roads." To my mind the distinction between a sale of the fee simple of real estate, or the granting of a lease—which would certainly come within *Bain* v. *Fothergill*—and a contract to grant a right of way is one that cannot be sustained. A contract to grant a right of way with the concurrence of all necessary parties is a contract for the sale of real estate. It is a contract which cannot be performed if the contracting party has not the title to the real estate, or does not acquire a title. It is just as essential to the grant of a right of way as it is to the

(1) 25 Sol. J. 371.

(2) Law Rep. 7 H. L. 158.

conveyance of an estate in fee simple, that the vendor should have a title to the land over which the right of way is to be given. The sewers, and the construction of the roads, and all those matters are only supplementary. The grant of the right of way is the thing which the School Board contract to give, and which they were to acquire. It was for this that they were to obtain the consent of all necessary parties, and that is to my mind the precise equivalent of what was mentioned and discussed in *Bain* v. *Fothergill* (1), namely, the sale of real estate, and I think it falls within the rule there laid down. The School Board have not performed their contract, because *Jenkins* kept them out of possession; and although he had not a title, he said that he had a title, and therefore for a time the School Board were unable to give the possession, which they were bound to give.

There is only one other remark which I think it necessary to make on this contract as distinguishing this case from *Bain* v. *Fothergill* and cases of that class. Here you have in the words which I read before a distinct and express contract by the School Board that they will within a certain time grant, or cause to be granted by all necessary parties, a way. That is to say there is an express covenant by the School Board which you will not find in any ordinary contract for sale, that either they have, or if not will acquire, and will cause to be conveyed the property or right which they have contracted to sell. That you do not find in ordinary contracts of sale, where the vendor simply agrees to sell the particular property to the purchaser. Now does that make any difference? Certainly not. An ordinary vendor when he contracts to sell a certain number of acres for say £1000 does in effect say: "I will give you the title I have, or if that is not a good title I will procure a good title from somebody else." That is the substance of the contract. If he cannot get the title of course it cannot be specifically performed; but if the contract is to sell the property and to get the concurrence of all necessary parties, and if that concurrence is within his power, he can be compelled, as vendors very often have been compelled, to obtain that concurrence. I do not think that the precise terms of the contract which is usual in cases of this kind, and is not usual in cases of ordinary sales between vendor and purchaser, makes the slightest difference. Therefore the rule being well established, and the case falling within the rule, it seems to me that as matter of law I am precluded from giving the Plaintiffs any damages for the non-performance up to this time of the contract.

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(1) Law Rep. 7 H. L. 158.

It is not for me to do more than accept the law as I find it laid down. If one may indulge in an expression of one's own opinion it would be more satisfactory perhaps if one could say that when a School Board, or any other body or person, has distinctly said: "Come what come may, be the rights of other parties whatever they may be, we will within a certain time give you that which is valuable to you, and which we know you have contracted to buy," and has then failed to perform it,—it certainly would be more satisfactory if one were entitled to say that when such a contract was not performed the person omitting to perform it should be liable in damages. But as regards the sale of real estate it has been settled the other way, and I have nothing to do but to follow the rule laid down, and which can now only be altered, if it is ever to be altered, by Act of Parliament.

In the possible event of the case going further I think I ought to say that, assuming the Plaintiffs to be entitled to any damages at all, I should not accept the estimate of the Plaintiffs, which was of an entirely speculative character, and to my mind very far from any proper estimate of the damages which the Plaintiffs have incurred, or could incur, by the non-performance of the contract. It is said, and said truly, that the Plaintiffs succeeded to Miss *Davidson's* rights, but it is proved by uncontradicted evidence that Miss *Davidson* in her sale to the Plaintiffs got £3500, and the advantages which the School Board have contracted to give in the shape of roads and access to the retained land. The present Plaintiffs have not enjoyed those advantages up to the present time, and my own opinion would be that if the Plaintiffs were entitled to any damages at all those damages would have to be estimated with some reference (I shall not say more) to that 3500*l.*, as a measure of the loss, whatever it may be, that they have incurred by losing the opportunity of realising that particular property. I make these remarks simply in the hope that they may be useful if the case goes further. If the higher

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Court think that the Plaintiffs are entitled to any damages at all, that seems to me the basis on which the inquiry which would then be directed would have to be worked out.

Therefore the judgment I pronounce is simply for specific performance, and the Defendants will pay the costs of the action.

Solicitor for Plaintiffs: *W. H. F. Brooks.*
Solicitors for Defendants: *Gedge & Co.*

C. M.

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1887
June 11, 13, 14, 15.

EVANS *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

[1886 E. 171.]

Canal Company—Damage—Authority of Act—Negligence—Wrongdoer—Action—Compensation under Act—Injunction—Damage not preventible.

On the bank of a canal constructed under an old Act of Parliament a mill had been built. In consequence of the working of a coal mine the canal and mill had subsided, and water leaked from the canal into the mill. The mill-owner brought an action against the canal company for an injunction and for damages:—

Held, that though a company authorized by Act of Parliament were not under the same liabilities as a private person, they were liable for damages if they were guilty of negligence, and that the canal company had been guilty of negligence, inasmuch as they might have prevented the damage; and that they were bound to compensate the mill-owner. But that, under the special provisions of their Act, compensation must be recovered as directed by the Act and not by action:

Held, that such being the case, an injunction would not be granted, and that apart from this, inasmuch as the time and extent of any further subsidence could not be foreseen, there ought not to be an injunction:—

Held, that the damage having been caused by the wrongdoing of the mine-owner did not affect the case.

BY the Act 34 Geo. 3, c. xxvi., the company of proprietors of the *Peak Forest Canal* was authorized to make and maintain a canal called the *Peak Forest Canal.* By the Act provision was made for giving compensation to the owner of any mill for damage done by the leakage of water from the canal, which compensation was to be assessed by commissioners or a jury as therein directed; and the company was empowered to buy any mines or minerals near or under the canal, the working of which might damage the canal (1).

By other Acts of Parliament, and ultimately by 9 & 10 Vict. c. cclxviii., the canal and works became vested in the *Manchester, Sheffield, and Lincolnshire Railway Company*, which thereby became subject to all the duties and liabilities of the canal company; and by a subsequent Act, the *Waterworks Clauses Act*, 1847, with respect to mines, was incorporated with their Acts.

In the year 1849 a cotton mill near *Dukinfield*, called the *Union Mill*, was built close to the canal, and at some time a wall for the purpose of a wharf had been built where the sloping bank of the canal had been, in the manner stated in the judgment.

At some time before 1872 a coal mine beneath the canal and mill had been worked, and in consequence the canal and mill had both subsided. The canal and its banks had been raised, but the mill being thus below the level of the canal, water had leaked through the bank or wall into the mill.

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(1) 34 Geo. 3, c. xxvi., s. 15: "If any injury or damage shall happen to be done to the owner or occupier of any mill, edifice, lands, or hereditaments, by the breach of any reservoir to be made for the purpose of the said intended canal or cut, or any of the locks or works of the said navigation, or by the water flowing from the said canal or cut, or any such reservoir, or from any other accident, then, and in every such case, full compensation shall be made to the owner and occupier of, and all other persons interested in, any such mill, edifice, lands, or hereditaments, by the said company of proprietors, for all such injury and damage; which injuries and damages, and the compensation to be made in respect thereof, shall be settled and determined or assessed by the ways and means herein directed with respect to other damages to be done by making and completing the said navigation."

By sect. 27 the owners and occupiers of any lands through or upon which the canal was intended to be made might accept and receive satisfaction for the value of such lands, and for the damages to be sustained by making and completing the works thereinbefore directed, and in case the company and the parties interested in such lands could not agree as to the amount or value of such satisfaction the same should be ascertained by commissioners appointed by the Act and subject to such verdict of a jury if required as thereinafter directed.

By subsequent sections commissioners were appointed and provisions made as to the procedure before them and as to the proceedings before a jury.

By sect. 51 it was provided that if the owner of any mine should work near the canal so as to endanger or damage the same, it should be lawful for the company to treat with the owner of the mine; and in case the company and the owner disagreed, then the commissioners or jury were to assess what satisfaction the mine-owner ought to receive from the company, on payment of which the owner was to be perpetually restrained from working the mine within the limits for which satisfaction extended.

W. L. Evans, the owner of the mill, brought this action against the railway company, claiming an injunction to prevent the company from allowing water to percolate from the canal into the mill, and claiming damages.

The action now came on for trial. Witnesses on both sides were examined. The effect of the evidence as to the subsidence and percolation and as to the building of the wall is stated in the judgment.

Barber, Q.C., *Jeune*, and *Farwell*, for the Plaintiff:—

The Defendants are no doubt a public body with the authority of an Act of Parliament, but they must take all reasonable precautions to prevent injury to others: *Geddis* v. *Proprietors of The Bann Reservoir* (1): *Rylands* v. *Fletcher* (2). The section in the Act which gives a right to compensation does not exclude an action: *Sellors* v. *Local Board of Health for Matlock Bath* (3); *Gas Light and Coke Company* v. *Vestry of St. Mary Abbotts* (4); *Flower* v. *Local Board of Low Leyton* (5). If the railway or canal is not properly kept there is a right to an injunction, and of course to bring an action. Our evidence shews clear negligence. *Dunn* v. *Birmingham Canal Company* (6) was a very similar case: *Bagnall* v. *London and North Western Railway Company* (7). An action lies for an injury unless the injury is expressly authorized by the Act: *Metropolitan Asylum District* v. *Hill* (8). The company cannot say that they are not obliged to keep up the banks of the canal, and that they may raise the water in the canal and flood the country: *Staffordshire and Worcestershire Canal Navigation Company* v. *Hallen* (9).

[KEKEWICH, J.:—I do not think there can be any doubt in this case on your representation of the facts; the only question would be as to the remedy.]

(1) 3 App. Cas. 430.
(2) Law Rep. 3 H. L. 330.
(3) 14 Q. B. D. 928.
(4) 15 Q. B. D. 1.
(5) 5 Ch. D. 347.
(6) Law Rep. 8 Q. B. 42.
(7) 7 H. & N. 423.
(8) 6 App. Cas. 193.
(9) 6 B. & C. 317.

If the Defendants allege that our only remedy is by compensation, even when they have been negligent, the words in their Act must be very clear.

Henn Collins, Q.C., and *S. A. Sampson*, for the Defendants:—

The Plaintiff can only succeed by shewing negligence on the part of the Defendants. The words of the 15th section of this Act are not like those of the *Consolidation Acts*, and are much stronger as to the remedy being by compensation and not by action. Most of the cases cited are on the *Consolidation Acts*. But as to our liability generally it is the mine-owner here who has caused the mischief and he is the wrongdoer. The railway company could not stop the mine-owner. That puts the case on the same footing as those of *vis major* or act of God, which have always been held to be exceptions: *Dudley Canal Navigation Company* v. *Grazebrook* (1). The very question has been decided in an action between this canal company and one *Johnson* (2). As to the

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(1) 1 B. & Ad. 59.

(2) MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY *v.* JOHNSON.

A special case stated by the direction of one of the Masters of the Court was argued before *Cave*, J., and *Day*, J. The action was by the railway company against the Defendant for damages and for an injunction to restrain him from working a mine under the *Ashton Canal*. The canal was made under the Act 32 Geo. 3, c. 84, and the canal had been transferred to the railway company.

Smyly, for the Plaintiffs.

Crompton, for the Defendant.

CAVE, J., delivered the judgment of the Court to the following effect:—

For the purpose of this case it must be assumed that the seams of coal were worked properly and in the usual way, but so as to cause damage to the canal, and the question was whether such working had "injured, prejudiced or obstructed" the canal within the meaning of the Act. It had been argued that these words could not be taken literally, but must mean that the owner of the mine is to do no unnecessary damage or injury to the canal or do any damage by working the mine in an unusual manner. The case of *Dudley Canal Navigation Company* v. *Grazebrook* (1 B. & Ad. 59) had been cited, and unless it could be distinguished was binding upon the Court. His Lordship then distinguished between the Acts. In the *Dudley Canal Act*, the mine-owner had to give three months' notice and the canal company had power to inspect the mine, and if they failed the owner might work the mine; and no provision was made for compensation to the mine-owner, whose only remedy was to work the mine, in all which the *Ashton Canal Act* differed. No doubt sect. 38 of that Act gave power to the canal remedy, it does not follow that because there has been injury an injunction will be granted: *Aynsley* v. *Glover* (1); *Holland* v. *Worley* (2).

[KEKEWICH, J.:—I think it has been proved and in fact admitted, that water has come from the canal into the mill, caused not by the defective construction of the canal but by subsidence occasioned by workings under the canal and the mill. To that extent I can relieve Mr. *Barber*.]

Barber, in reply:—

As to an injunction, the prevention of the leakage is a mere question of expense and it can be done. The canal company got power to make their canal and bring water there and they must keep it within their bounds. If from some cause the banks sink, that is their business. As to the damage being caused by a wrongdoer, the canal company may have a remedy over against him, but that does not concern us: *Charles* v. *Finchley Local Board* (3). They might have purchased the minerals, but they thought it unnecessary and preferred to run the risk.

[As to negligence, KEKEWICH, J., referred to *Powell* v. *Fall* (4).]

That case is strongly in favour of the Plaintiff and must be taken to have overruled *Rex* v. *Pease* (5) and *Vaughan* v. *Taff Vale Railway Company* (6). The Defendants cannot shew that what has happened is the direct result of the powers given to them by Parliament, nor is there any *vis major*, or anything which might not have been foreseen and provided against.

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company to treat with the mine-owner, but that was only because a company required to have such power expressly given. The scheme of these two Acts was quite different, and the literal construction of sect. 37 of the *Ashton Canal Act* was inconsistent with the provisions of sect. 38.

The Court held that the canal company was entitled to recover damages from the mine-owner in respect of all subsidence caused by his workings; but as to an injunction only to one obtained in the manner pointed out by the 38th section.

(Taken from a note of the judgment.)

The clauses in the *Ashton Canal Act* were in almost the same words as those in the *Peak Forest Canal Act*.

(1) Law Rep. 18 Eq. 544.
(2) 26 Ch. D. 578.
(3) 23 Ch. D. 767.
(4) 5 Q. B. D. 597.
(5) 4 B. & Ad. 30.
(6) 5 H. & N. 679.

KEKEWICH, J. (after expressing his regret that in such a case there were no means of directing inquiries and stating the issues before the trial), proceeded to decide the questions of fact:—First, that there was water in the mill coming from the canal. Secondly, that this was in the first instance due to subsidence occasioned by mining. Thirdly, that the water had occasioned some damage, but perhaps not more than would be represented by a nominal sum. Fourthly, that the presence of water in the mill was not preventable in the past and would not be preventable in the future by any reasonable means and at any reasonable cost. [His Lordship then proceeded to consider the questions of law depending upon those facts.]

The first question I have to consider is this, are the Defendants liable for the damage in the past, and will they be liable for the damage in the future; that is to say for the damage which has been and probably will be occasioned. It is the same question. If they are liable for the damage in the past, they will be liable for the damage in the future if it occurs.

Now before expressing an opinion upon that question, I have to consider the legal principles applicable to the facts. Generally speaking every man may use his own property as pleaseth him best—but this use must be such as not to cause injury to his neighbour—that is, harm or loss of that kind which is regarded by English law as the subject of civil action. If, therefore, he chooses to bring on to his own land water, stench or filth (I think those are the three examples given in the case I am just about to refer to), he must keep it there at his own peril. If it escapes, he is liable for the injury caused, and it is no answer to say, "I could not help it, I took the best advice, I employed the best workmen, and I have done everything that modern science could suggest, but the circumstances have been too much for me, and the injury has been caused against my will and against my best endeavours." The injured neighbour is entitled to reply: "You should have thought of this before you exercised your right of property, and the consequences are yours." That to my mind is an imperfect summary of the case of *Fletcher* v. *Rylands* (1), which is of extreme interest to the lawyers and also to the public;

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(1) Law Rep. 1 Ex. 265.

and all the more so because it went to the House of Lords, and the doctrine there laid down is established by that paramount authority. But though the case did go to the House of Lords (1), and we have the advantage of the judgments of Lord *Cairns* and Lord *Cranworth*, it is to be remembered that they dealt with the case with comparative brevity, because they relied upon the decision of Mr. Justice *Blackburn*; and really their judgments, if I may say so with respect, do not profess to be and are not much more than an affirmation of Mr. Justice *Blackburn's* full and considered judgment in the Exchequer Chamber. Therefore I may with propriety refer to that latter judgment for the purpose of stating the principles of decision in that case. At Law Rep. 1 Ex. 279, he uses that language which is referred to by Lord *Cairns* as being a statement of the true rule of law. I quote this passage because of Mr. *Henn Collins*' remarks with reference to the intervening third person, which I was unable to follow. Mr. Justice *Blackburn* says: "He" (that is the person who has brought on his land a wild beast, or water, filth, or stench and allows it to escape) "can excuse himself by shewing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major* or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient," so that he excludes every other possible excuse, and puts it simply upon that. Of course it will be an answer to a plaintiff that he has contributed or mainly contributed to that of which he is complaining, but the only other examples which he admits as possible are *vis major* and the act of God. That judgment of Mr. Justice *Blackburn's*, which deserves to be read at length and studied, but which I do not think I ought to read at length and study in public, affirmed a judgment of Lord *Bramwell's*. Lord *Bramwell* dissented from the other Barons of the Court of Exchequer in the Court below, so that even apart from the authority of the House of Lords the case has the high authority which attaches to every judgment of Lord *Bramwell's* and of Lord *Blackburn's*. That case has been followed in a great many others; it has been commented upon in cases without number, it has been distinguished in some; but the principle has, so far as I know, never been departed from. Of course, being a decision of the House of Lords it could not be properly departed from; but as far as I am aware there has been no decision which in the slightest degree impugns the principle—a principle which is neatly expressed in the head-note to the report of the case (1): "That the defendant was responsible, on the ground that he had caused water to flow into the plaintiff's colliery which but for the defendant's act would not have gone there."

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(1) Law Rep. 3 H. L. 330.

Next I have to consider whether this principle is applicable to a railway or canal company, which is a body empowered by Act of Parliament to take land and thereon to construct certain works, or to employ certain machines, coming within the wild beast class. In some sense railway companies and canal companies exercise merely rights of ownership; but on the other hand much that they do is by reason of their statutory powers, and what can be referred to those powers must be treated as done under those powers. There are many things done by a railway company which have nothing whatever to do with their statutory powers. If they employ a cart to carry material it can scarcely be said that their liability in consequence of improper driving or any other carelessness has anything to do with their statutory powers. They would be sued in such a case as any other owner of the cart would be sued. Those are not the cases which we have to deal with here. The greater part of their acts are necessarily and properly referred to their statutory powers, though it is quite possible that the same thing might be done by them as owners of the land, they having obtained the land by means of their statutory powers. That brings in a distinction which is very shortly stated in *Geddis* v. *Proprietors of The Bann Reservoir* (2), where I think it is better stated for my purpose by Lord *Blackburn* than by Lord *Selborne*. At the bottom of the page 455, he says, "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they

(1) 3 H. & C. 774.

(2) 3 App. Cas. 430.

have at Common Law," (he places the two together now) "the damage could be prevented it is, within this rule 'negligence' not to make such reasonable exercise of their powers." That is the distinction drawn there with reference to these companies, and subject to one exception I find no departure from that in other cases. The one exception is that which depends on *Rex* v. *Pease* (1), and *Vaughan* v. *Taff Vale Railway Company* (2). In those two cases it was held that where the Legislature has authorized in an unqualified manner the use by a railway company of a certain machine, as, for instance, a locomotive engine, which cannot be used without risk of injury, the company are not liable for the ordinary use of the machine so authorized. There have been attempts from time to time to pare away those decisions by holding in different cases that there has not been an unqualified authority given by the Legislature, but they have recently been upheld in the House of Lords (3), and the exception to the principle must be taken to be established. This case, however, falls within the principle, and is not affected by the exception.

Bearing in mind that principle of law, and all the facts which have been proved, I have to decide whether there has been any negligence proved on the part of the Defendants leading to the result which I have found actually to have happened, namely, the escape of water from the Defendants' canal to the Plaintiff's premises.

In order to consider the difficult question of negligence, I must consider what negligence means, and I take the words of Lord Justice *Bowen* in a recent case, which was on a somewhat different subject, but is by no means unworthy of attention with reference to this particular case, *Thomas* v. *Quartermaine* (4): "The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody." I have, then, to consider what was the care which the Defendants were bound by law to exercise towards the

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(1) 4 B. & Ad. 30.

(2) 5 H. & N. 679.

(3) *Truman* v. *London, Brighton, and South Coast Railway Company*, 11 App. Cas. 45.

(4) 18 Q. B. D. 685, 694.

Plaintiff, and I may here say that I speak all along of the Plaintiff and the Defendants, remembering, nevertheless, that from time to time there have been changes in the devolution of title, and that the canal was not originally made by the present Defendants, nor was the present Plaintiff originally the owner of the property in respect of which he now sues.

What was the care, if any, which the Defendants were bound to exercise towards the Plaintiff? Applying the principle of *Fletcher* v. *Rylands* (1), the case seems to me to be plain enough. They were bound to prevent, if they could, the escape of water from their canal to the Plaintiff's premises; and if unfortunately, by reason of some unforeseen events, or some events which they could not reasonably have anticipated, an escape of water which they might have prevented has occurred, they are liable to make compensation for their negligence and for the result of that negligence. I find no difficulty, having regard to the principle laid down in these cases in concluding that they did not exercise proper care. Therefore, finding the duty neglected I find also the negligence. But the negligence to my mind is not that of preventing this subsidence or preventing the consequences of subsidence which could not be sufficiently foreseen, but in not making good the damage to the canal when the damage occurred, or rather in not preventing injury to the mill at the moment of occurrence, which, of course, was far more possible, and it may be said reasonably possible; that is to say by not damming-up the water by proper and sufficient puddling or walls at the moment that the subsidence took place and before the water actually escaped. This to my mind is the position; this is the want of the exercise of care; therefore the negligence, and therefore the responsibility, falls on the Defendants.

There are very few answers to that, but there are some which I must consider. The main answer is that put forward by Mr. *Henn Collins* with reference to the mine-owner being a wrongdoer. As regards that he has cited a case decided in 1883 by Mr. Justice *Cave*. It was an action to which the railway company were parties, and it was decided on an Act of Parliament in precisely the same language as the Act of Parliament, and on a

(1) Law Rep. 1 Ex. 265.

special case raising the particular question which I have to consider now. Mr. *Barber* says that the attention of the Court was not called in that case as it ought to have been—and he appears to be quite right in saying that it was not—to the clauses of the *Waterworks Clauses Act* affecting the case. Speaking for myself, I consider it my duty when I find that a Judge of co-ordinate jurisdiction has decided a case on argument deliberately and on precisely the same materials (and here I have two Judges, Mr. Justice *Cave* and Mr. Justice *Day*, concurring), I ought to be extremely slow to depart from it merely because some Act of Parliament was not mentioned or some authority was not cited. I might as well decline to follow it because I happen to know that the counsel was badly instructed or that he was an inexperienced young man. I think it would be dangerous and wrong to go into questions of that kind. I find a decision open to appeal, and now four years old, and I think it is my duty to follow it. I am far from saying that it is so far binding upon me that I may not consider it. I will not even go so far as to say that if it struck me as manifestly wrong—and if I could say that the omission to consider some Act would manifestly alter the whole case—as, for instance, if some decision of a binding authority on all fours had not been cited, then I am far from saying that I ought not to consider it, but I think that the proper and safe course is to follow a decision of a Court of co-ordinate jurisdiction, unless some cogent reason is given to the contrary.

Therefore, following that case, I hold that here the mine-owner under the canal (it only applies to land under the canal) was a wrongdoer when he worked the mines under the canal so as to cause the subsidence. But having got so far (and I think it necessary to say so much because the point has been urged) I for my part do not see that it leads to any consequence whatever. The mine-owner may have been wrong, and Mr. *Henn Collins* argued that because the mine-owner was wrong the present Plaintiff cannot sue. I am sure he meant to put an argument which was intelligible, and on grounds which were tenable, or at least arguable. But I have been unable myself to see the connection between the mine-owner and the Plaintiff which would justify me in saying that because the mine-owner was wrong in working, therefore the Plaintiff cannot sue. There may be other answers to the argument, having regard to the cases which were cited—cases in which the mine-owner has been entitled to recover for damage to his mine, notwithstanding that the railway company have had an opportunity of purchasing; but I pass over all these because I think the remarks I have already made dispose of that.

Then there is another argument which deserves consideration, and it is this. It is said that there is against this canal, at a critical point, a wharf wall, that that wharf wall was built by the Plaintiff or by his predecessors in title; that that wharf wall was substituted by him for the wall of the canal, that that wharf wall has given way, and that it does not lie in the mouth of the Plaintiff to say there has been an escape of water from the canal through the wharf wall which he constructed. To my mind that argument is unsound, and for this reason. I do not think it can matter in the least who built the wharf wall. The wharf wall must have been the wall of the Defendant company. Whether it was built for the convenience of the mill-owner, whether it was built by the mill-owner as a matter of employment of his workmen, or whether it was paid for by the mill-owner, seems to me to be immaterial. It is the retaining wall of the canal, and the owners of the canal are bound to have a proper retaining wall; that is to say, in the shape of stone, or puddle, or something else; they are bound to keep the water in, and if they have been foolish enough, for the sake of getting somebody else to pay for the erection of the wall for his convenience, to allow him to put in an inefficient wall, that is their fault and not his. If they have any contract with him, they may sue him upon the contract, but the wall I must regard, by whomsoever constructed, as constructed by the Defendant company in discharge of their duty to prevent the escape of the water of the canal; and the mere fact that it has been used as a wharf or as a boundary to the Plaintiff's mill seems to me to be utterly immaterial. Clause 97 of the private Act was referred to, but I think when looked at it is hardly of any assistance in considering this or any other question connected with the case. It gives power, no doubt, to landowners in the neighbourhood to erect wharves adjoining or near to the canal, and in doing that they are not to obstruct or prejudice the navigation, which, if it shews anything, shews what one would have expected—that the canal company were to have an effective control over any works which were erected.

I think that those are the only two points, independent of the general case, which I need notice; and therefore on the question of law, following the principle which I have extracted from the cases and consider to be established, I hold that the Defendants are liable for the damage in the past occasioned by the escape of water from the canal into the Plaintiff's premises consequent on the subsidence of the ground, and that they will be liable for like damage if it happens in the future.

I now come to a practical question. Finding the facts mainly in the Plaintiff's favour, finding the law also in the Plaintiff's favour, I must ask what is his remedy? I confess to having had considerable difficulty in arriving at a conclusion upon this point. No doubt if it is negligence in the sense of something not authorized by the Act of Parliament, or negligent use of the company's powers, *primâ facie*, that gives rise to a right of action, and if there were no clause in this particular Act of Parliament in the way, I should certainly hold in this case that the Plaintiff is entitled to maintain an action against the Defendants for the damage occasioned, and that he would be entitled again whenever that damage recurs. But then I turn to the Act of Parliament and I find a clause which provides: "If any injury or damage shall happen to be done to the owner or occupier of any mill, edifice, lands, or hereditaments, by the breach of any reservoir to be made for the purpose of the said intended canal or cut, or any of the locks or works of the said navigation, or by the water flowing from the said canal or cut, or any such reservoir, or from any other accident, then, and in every such case, full compensation shall be made to the owner and occupier," and that is to be assessed in the manner provided by the Act. The question which I have to consider is, whether what has happened here has happened "by the water flowing from the said canal or cut, or any such reservoir, or from any other accident." It has happened by the water flowing from the canal. That is my finding in the Plaintiff's favour. There is no doubt about that.

But then it is said not by water flowing by reason of accident, but by reason of their negligence. Now it seems to follow, and it does to my mind follow from my conclusion, that they could not have prevented this subsidence, and therefore could not have prevented the cause of the escape; that is, that the *causa causans* of the damage is an accident. I have already explained that in my opinion negligence arises, not before the accident occurs, but when the accident occurs—not when the subsidence takes place, but when the water escapes by reason of that subsidence. It was not argued, either in opening the case or in reply, that the Defendants were guilty of negligence by reason of their having permitted the mines to be worked. The point was not tenable, and was not urged. That being so, and following my own conclusion, I think I must further hold that what has happened here is an accident within the meaning of this clause—an accident for which they are responsible, but for which they are responsible in damages to be, if the parties cannot agree, assessed in the manner provided by the Act of Parliament and not by reference to the Chief Clerk, or to the official or other referee. That is my view. It is a short point of construction—a point which I can well conceive other minds taking a different view of, but it seems to me that what has happened here is an accident within the meaning of that clause.

I have been much pressed to grant an injunction. If I am right in the view which I take of that clause, of course I should not grant an injunction. It is a case provided for by the section for which damages must be assessed from time to time as damages accrue. But I think it is as well to say that in no event should I have granted an injunction in this case. An injunction in a case of this kind is of little value as against the Defendant company, who can only be reached by sequestration; but apart from that I think it would be wrong to enjoin a company or an individual from permitting that to be done which is really beyond his control—not beyond his control in this sense, that there is a *vis major* or an act of God paramount—but beyond his control in the sense that he cannot by any precaution or by any works with reasonable certainty prevent that happening which all contemplate as likely, namely, a further subsidence of the foundations of the canal and its banks. I think it would be an extremely hard thing to move against a defendant for committal (and I must put it as if it were an individual defendant), because he has permitted that to be done—perhaps a new subsidence followed by an escape of water suddenly in the night—which he could not foresee at that particular time, and could not reasonably prevent. My conclusion upon that part of the case, especially as regards the injunction, depends entirely upon my finding as regards the questions of fact which I mentioned at the commencement of my judgment. It may well be that if my findings upon those questions are wrong, my conclusion as to the injunction is also wrong. The remedy ought to follow, and ought to be made as far as possible commensurate with the right. The right depends upon the facts. I think that because it would not be commensurate with the right but would go far beyond that, I ought not in any event to grant an injunction.

I think, therefore, that the Plaintiff is entitled to a finding that damage has been caused; I will not put it in the form of a declaration, but express the opinion of the Court that water has escaped from the canal on to the Plaintiff's premises, for which the Defendant company are liable to make him compensation; and I see no reason, having regard to the evidence, why I should not further declare that the Defendants are liable, and will be liable to make good to the Plaintiff any damage occasioned by the escape of water from the canal on to the Plaintiff's premises consequent upon any further subsidence of the canal. The evidence so clearly contemplates that further subsidence, and the question has been so directly put in issue here, that I think there is no impropriety in doing that which is generally not desirable, namely, making a declaration with regard to the future.

I have only to deal with one more important subject, and that is the question of costs. I have on two important points decided in favour of the Defendants. I have decided that they ought not to be enjoined, and I have also decided that the question of damages, which I must say again I look upon as trifling, is to be determined in the way pointed out by the Act, and not by means of an inquiry; in other words, I have decided the question of the construction of the Act on those points in their favour. But, on the other hand, having looked through the pleadings carefully, I am satisfied that though every point was intended to be fairly raised on the pleadings in order to get the relative rights of the parties settled as far as they could be by the decision of the Court, the Defendants come here substantially to say, "We are not responsible to the Plaintiff," and they even go further than that, because they say, in the first place, there has been no injury done at all, and, further, we are not responsible to you if there has been any injury done. Upon these two questions, which are questions of substance, and make together the main question in the action, I have decided in favour of the Plaintiff. I do not consider this a case in which I ought to distribute the costs; and having regard to the main question, and the result, the Plaintiff is entitled to the costs of the action.

Solicitors for Plaintiff: *Pritchard, Englefield, & Co.*, agents for *Earle & Sons, Manchester.*

Solicitors for Defendants: *Cunliffes & Davenport*, agents for *R. B. M. Lingard-Monk, Manchester.*

C. M.

COOKE *v.* NEW RIVER COMPANY.

[1886 C. 2392.]

KEKEWICH, J.
1887
July 1.

New River Company—Dwelling-house—Water—Charge—Rateable Value—Meter.

A warehouse in which no one sleeps or takes meals is not a dwelling-house within the meaning of clause 35 of the *New River Company's Act*, 1852; and the company cannot insist on charging according to the rateable value of the warehouse for water supplied to it for domestic purposes.

The company is obliged to supply to such a warehouse water for domestic purposes and for a hydraulic lift, charging for it by meter, according to clause 41 of the Act.

COOKE, SONS, & CO., the Plaintiffs, for their purposes as carpet warehousemen, occupied a warehouse in *Friday Street.* It was six storeys high, without any internal partitions on the floors. No one slept in the house and no one habitually took meals in it.

KEKEWICH, J.
1887
COOKE v. NEW RIVER COMPANY.

About twenty clerks and thirty porters were employed there during the day. Water was used for waterclosets and lavatories, and for washing the house, and for a hydraulic lift. The *New River Company* had since 1871 supplied the water by meter under an agreement. The Plaintiffs, by notice, put an end to the agreement, as from the 23rd of June, 1886, and on the 1st of June, 1886, they sent to the *New River Company* a request that after the 24th water might be afforded by meter and charged for according to the rates specified in the *New River Company's Act*, 1852.

The Defendants refused, and contended that for the lift the Plaintiffs were not entitled to water except by agreement, and that for water supplied for waterclosets, lavatories, and washing, being domestic purposes, the company was entitled to be paid according to the annual value of the house as a dwelling-house. The annual consumption of water was stated to be about 260,000 gallons, which if supplied by meter would be charged for at the rate of 1*s.* 3*d.* per 1000 gallons, amounting to about £15 a year, whereas if the charge depended on the annual value it would be £50 to £60.

The *New River Company*, the full title of which is "*The Governor and Company of the New River brought from Chadwell and Amwell to London,*" had until the year 1852 carried on their business under a charter granted in the reign of *James* I., subject to some subsequent Acts of Parliament. In 1852, the *New River Company's Act*, 1852, was passed incorporating the *Lands Clauses Consolidation Act* and the *Waterworks Clauses Act*, 1847, with the exception of certain clauses (1).

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(1) 15 & 16 Vict. c. clx.

Sects. 2 and 3. That the *Lands Clauses Consolidation Act*, 1845, should be incorporated with this Act; and that the *Waterworks Clauses Act*, 1847, except the provisions with respect to the communication pipes to be laid by the undertakers and except sect. 35 in that Act should be incorporated with this Act.

Sect. 35. "That the company shall, at the request of the owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall be laid, or of any person who, under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes at the rates hereinafter specified (that is to say): for water supplied to any dwelling-house; where the annual value of the dwelling-house shall not exceed £200, at a rate per centum per annum on such value not exceeding

Sir *H. Davey*, Q.C., *Finlay*, Q.C., and *Dobbs*, for the Plaintiffs.

Sir *R. E. Webster*, A.G., *Warmington*, Q.C., and *V. Hawkins*, for the Company.

KEKEWICH, J. (after deciding that the Plaintiffs were wrong as to the removal of a meter and must pay a certain sum for the costs of the Defendants as to that part of the action, continued):—

But as regards the substantial questions which both parties have come here to argue, I have been referred to the charter of the *New River Company* and to the position of the company under their charter prior to the Act of 1852. That Act seems to me to have entirely altered their position. It recites the charter and some prior Acts, and that "it is expedient that the said company should be enabled to obtain an improved supply of water, and also to alter, divert, shorten and improve the course of their river, and to construct additional reservoirs for filtering and storing water, and certain other works for the better supply of such water to the metropolis." This is, in fact, a contract between the company on the one hand and that part of the public requiring to be supplied with water by the company on the other hand, that in consideration of large powers of taking land compulsorily and otherwise, conceded to the company, they shall be under obligations under which they did not previously lie. I think the whole Act must be construed with reference to that situation, which of course is common as regards such companies,

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£4; where such annual value shall exceed £200 at a rate per centum per annum on such value not exceeding £3."

Further charges might be made for waterclosets, baths, &c.

Sect. 40. "That the company may supply any person or body within their limits with water, to be used within such limits for other than domestic purposes, at such rate and upon such terms and conditions as shall be agreed upon between the company and the person or body requiring such supply."

Sect. 41: "That the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter or other instrument or mode for measuring and ascertaining the quantity of water so supplied, and may charge for such supply not exceeding the following rates per 1000 gallons."

and which I should not have mentioned but that the position anterior to that of 1852 was called to my attention.

With the Act of 1852 the *Lands Clauses Consolidation Act* and the *Waterworks Clauses Act*, 1847, with the exception of certain clauses, are incorporated. Now why are certain specified clauses excepted? One knows, with reference to all these Acts, that certain clauses are excepted for two reasons. Either because they are not apt to the matter in hand, or because, having regard to the special circumstances, the Legislature thinks that practically the same powers or the same liabilities should be given or imposed in different language adapted to the particular circumstances. Therefore we find excepted the provisions with respect to the communication-pipes to be laid by the undertakers, which we shall find in the Act of 1852 in a different form; and clause 35, as to the supply of water to be furnished by the undertakers, which we shall find provided for in clause 34 of the Act of 1852. All the rest is incorporated, and I take it that the proper way of construing the Act is to consider, that the whole of the *Waterworks Clauses Act* of 1847, with the exception of those particular clauses, is written into the *New River Company's Act* of 1852, and to treat it as if there was one Act and one only. If there is any contradiction (and far be it from me to say that there is no contradiction between the words of the general Act and the words of the special Act in this or any other case) then no doubt it is lawful to look at the special purpose of the special Act, and possibly to read the words of the special Act, that is to say, those which are brought in for that special purpose, as overruling the words of the general Act. But the proper way, subject to that consideration, is to look at it as one whole, and to read the *Waterworks Clauses Act*, 1847, into the company's Act of 1852. I do not propose to go through every clause critically, because I do not desire to consume such an amount of time, and I am not sure that it would answer any useful purpose for me to explain precisely my construction of every part of every clause. There are many difficulties, there are many contradictions, and though I have myself arrived at what seems to me a satisfactory critical construction of the particular words of a particular clause, it has occurred to me, as I have no doubt it has also occurred to counsel on both sides, that such construction may seem to be inconsistent with a construction placed on some other clause. It unfortunately is the case with all these Acts of Parliament. They bristle with different constructions. But I think there is one general line going through them, and I do not think that there is any serious difficulty as to interpreting the Act in the way in which I propose to interpret it.

The 34th clause obliges the company to supply water within certain limits, and I should not have referred to it but for this—that the expression is "owners or occupiers of houses." The request in consequence of which they are to be put under obligation is to be made not by the owners or occupiers of "dwelling-houses," but owners or occupiers of "houses," which would include, of course, every building within the limits of the operation of this Act. When you come to clause 35 you get the same or an equivalent word: "The company shall, at the request of the owner or occupier of any house, or part of a house," and it would have been natural to expect the clause to deal with what was to be done at that request. But immediately afterwards you find the operation of the clause limited to a much smaller class. Before passing on to that I wish to refer (especially as the Attorney-General dwelt upon it) to clause 53 of the general Act, which provides that, "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand . . ." When I look at clause 35 I find that the persons who were in contemplation there are those who are entitled to demand a supply of water for domestic purposes, which is the word used in clause 53. If, therefore, clause 53 is read immediately before clause 35, the two run together reasonably well. Those persons who are entitled to demand a supply of water for domestic purposes are to have furnished to them a sufficient supply of water for domestic purposes. The framer of the Act apparently paused there and said "domestic purposes may be applicable to dwelling-houses and other houses. Therefore, I will begin and state what is to be done to dwelling-houses, the purposes of which may be different in degree, though not otherwise, from the purposes of other houses." Then the clause proceeds to deal with water supplied to any dwelling-house. I have looked carefully through the rest of the clause, and it seems to me to be all limited to dwelling-houses, and to have no other application. At first I thought there might be a break made after the second sub-division following upon "dwelling-house," where the words introduced are "any such dwelling-house or place." Why the words "or place" are brought in I do not know. But when I observe that not only is it "such dwelling-house or place," but the rates to be charged as there mentioned are in addition to the rates above specified, I think they can only be rates to be paid in respect of the same property as pays those above mentioned, to which they are additional, that is "dwelling-houses," and if I am bound to give any interpretation to the words "or place," I think it may fairly be interpreted as meaning part of a house, though the expression is not happy as describing part of the house which might be a dwelling-house within the meaning of the Act.

Then the question which comes directly before me is, "Is this a dwelling-house?" I may conveniently decide that without passing on to the other clauses, though I should not do so, of course, if I did not think the other clauses might be read consistently in the way I do read them with this clause. A "dwelling-house" certainly means a place where somebody dwells. That is the first meaning, the meaning which is given in dictionaries and the meaning which underlies the explanations given of the word "dwelling-house" in other Acts of Parliament. I am not sure that it would be safe to rely upon the interpretation of other Acts of Parliament, because here it is introduced for a particular purpose, namely, the supply of water. I think one must look at it with special reference to that object, and that it must mean a place where somebody dwells. No one dwells in this house. It is purely a place of business. There is no caretaker; no person resides there. It is used for a wholesale business, occupied, no doubt, during the day by persons in the employ of the Plaintiffs and by the Plaintiffs themselves for the purposes of business. If there is anything in the way of feeding

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there it is a mere accident. There is no provision for it, and apparently if it ever occurs it is exceedingly seldom. I see nothing to bring this warehouse within the meaning of the term "dwelling-house." I think that it must be held to be outside the definition of a dwelling-house, and that, therefore, as regards domestic purposes which are here mentioned, if there are any domestic purposes for which they are entitled to a supply of water they are not domestic purposes for a dwelling-house. My own conclusion is, that all the water which these Plaintiffs use is really water for domestic purposes except that used for the hydraulic lift. I think it is a fair thing to say that when a clause carefully excepts certain purposes from domestic purposes, all other purposes—at any rate, all other purposes of like character with those mentioned—must be fairly domestic purposes. We have heard a description of the purposes for which the water supply is wanted here, lavatories and so forth. I think they are all domestic purposes. But I have already expressed my opinion that they are not domestic purposes in a dwelling-house.

As regards clause 38, I need say no more than that the hydraulic lift clearly comes within "working any machine or apparatus." Then, passing on, we have to see what, if anything, is provided as regards that. There has been a good deal of comment on clauses 39 and 40. Directly they were referred to the view occurred to me which was pressed by Sir *Horace Davey* in argument, and which I think was the right view, that they are inserted merely for the purpose of getting rid of any doubt which might otherwise occur to legal or lay minds respecting the powers of the company to enter into special agreements. I think that as Sir *Horace Davey* said, they are only meant to make *intra vires* what might possibly have been otherwise *ultra vires*. I see no difficulty in that construction. That being the construction, I see no impropriety in their presence in the Act, nor do they interfere with my construction of either clause 35 or clause 41.

Then I come to clause 41: "That the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter." Of course, there is considerable difficulty in ascertaining who a consumer of water is. Take the case of a man who up to this time has not had any water at all, that is to say, who has a new house. He makes a request. It is not the request of a consumer of water because he has had no water, and the word is inappropriate, however you consider it. I think the reasonable meaning of the word is a person who is living within the limits which the company supplies and who intends to be if he has not hitherto been a consumer of the company's water. It is not necessary for me to construe it, but that seems to me to harmonise with the rest of the clauses. Then he is to be supplied "for purposes other that the purposes for and in respect of which the rates or charges are hereinbefore provided or limited." Why should I reduce that? I have got an Act which compels the company, as I read it, to supply dwelling-houses for domestic purposes. I have got an Act which enables them to make special agreements. Then I expect to find a further clause saying that what has not been provided for in the previous sections shall be provided for somewhere else. It would be giving, to my mind, a strange construction to the Act to say that they are only obliged to supply water for dwelling-houses, or for domestic purposes, which is the construction urged upon me. I should expect to find, having regard to the object of the Act, that the company are under an obligation to supply water for purposes other than domestic purposes, and for houses other than dwelling-houses. I therefore read this 41st clause according to its plain grammatical reading as regards this part, and I say they are bound to supply water for all purposes other than those in respect of which rates and charges are thereinbefore provided or limited. Nothing is thereinbefore provided or limited except for the domestic purposes of a dwelling-house, and therefore I read it as imposing the obligation to provide water at a fixed charge measured in the way mentioned for other purposes. That seems to me to harmonise with the rest of the Act.

There are two things which I ought to mention: first, that I have the words, "at their own instance." It is very difficult to give any meaning to those words, but I think I see a meaning which may probably be attributed to them if ever the question requires decision. It is not necessary for me to state it now, and I refrain from expressing any opinion.

As regards the case of *Metropolitan Board of Works* v. *New River Company* (1), before Mr. Justice *Fry*, the shorthand notes of which in the Court of Appeal were handed up to me, I can dispose of it in this way. The question there was whether certain public purposes which are mentioned in clause 57 of the general Act came within clause 41. The Court below and the Court of Appeal held that those public purposes did not come in and therefore they decided simply that short point. The present Master of the Rolls, then Lord Justice *Brett*, expressed an opinion which was certainly adverse to that which I have expressed respecting this construction of clause 41, but he took great care to leave it open to any Judge who had to decide the question to decide it according to his own view. It is quite unnecessary for me to say that I feel great diffidence in differing from an opinion of the Master of the Rolls, even though expressed in that way, and not necessary for the purpose of the case before him. But on the other hand I must not allow any diffidence to prevent my forming and expressing my own opinion, and my opinion certainly is that the company are bound by that section to supply water to be measured by means of a meter and paid for accordingly for all purposes not provided for before, that is to say, for all purposes other than domestic purposes, and, according to that decision, for certain public purposes with which we have here nothing to do.

My conclusion, therefore, is that the Plaintiffs are right, that they are entitled to have their building—not their "dwelling-house," as I hold—supplied with water, both for general purposes and for the hydraulic lift, according to the terms mentioned in sect. 41, and that the Defendants are wrong in seeking to charge them according to the rateable value. Therefore there will be a declaration in the Plaintiffs' favour, and the Defendants will pay the costs of the action, setting off the sum which I have awarded as regards that part of the case in which I hold the Plaintiffs to fail.

Solicitors for Plaintiffs: *Hollingsworth, Tyerman, & Andrewes.*

Solicitors for Defendants: *Thompson & Debenhams.*

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(1) 37 L. T. (N.S.) 124.

C. M.

KEKEWICH, J.

1887

July 7, 8.

BIRMINGHAM AND DISTRICT LAND COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1886 B. 571.]

Railway Company—Notice to treat—Disputed Interest—Action by Landowner for Declaration of Title—Jurisdiction of High Court.

A., in possession of land under a building agreement, which required the houses to be erected by November, 1885, was in 1882 informed by a railway company of their intention to obtain a special Act to extend their railway system, which scheme would affect his land. *A.* thereupon arranged with his landlord for an extension of the time limited by his agreement—no definite period being fixed—and suspended his building operations. The company obtained their special Act in 1883, and in 1884 gave *A.* the usual notice to treat for part of the land comprised in his building agreement, but *A.* sent in no claim under the notice. In 1886 the company took adverse possession of the land in question, treating the building agreement as at an end, and insisting that *A.* had no interest whatever in the land. On action brought by *A.* against the company for a declaration that the building agreement was still subsisting, and that he was entitled to have his interest thereunder assessed in the usual way:—

Held, that the jurisdiction of the Court was not ousted by the procedure under the *Lands Clauses Consolidation Act*, 1845, and that *A.* was entitled to the declaration he claimed.

East and West India Docks Company v. *Gattke* (1) and *London and Blackwall Railway Company* v. *Cross* (2) distinguished.

BY a building agreement dated the 5th of February, 1877, and made between *M. P. W. Boulton*, the tenant for life and leasing authority under the *Boulton Estate Act*, 1874, of the one part, and the Plaintiff company of the other part, it was agreed that during ten years from the 30th of November, 1875, the Plaintiff company, for the purpose only of building and executing works in manner thereinafter stipulated, might enter upon the lands specified in the plan thereto annexed (being part of the *Boulton* settled estates); and the Plaintiff company were within the said ten years at their own expense to erect and finish on the said lands at least 120 houses in accordance with the plans and specifications therein mentioned, and were (until leases should have been granted) to pay the fixed yearly rent therein specified, and leases were from time to time to be granted for terms to expire on the 25th of December, 1974. The agreement also provided that the reversioner might vacate the contract thereby made as to such part of the said lands as should not for the time being have been actually leased in pursuance thereof, and might re-enter upon the same land and take possession thereof and of all buildings thereon, and might dispose of the same to the exclusion of the Plaintiff company as if that agreement had not been entered into, and without making them any compensation in case the buildings thereby stipulated to be built should not be completed in accordance with the agreement before the expiration of the time within which the same were agreed to be completed as aforesaid.

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(1) 3 Mac. & G. 155.

(2) 31 Ch. D. 354.

By another building agreement dated the 5th of April, 1877, and made between the said *M. P. W. Boulton* of the one part and the Plaintiff company of the other part, it was agreed that during six years from the 30th of November, 1875, the Plaintiff company, for the purpose only of building and executing works in manner thereinafter stipulated, might enter upon the lands specified in the plan thereto annexed (being part of the same settled estates); and the Plaintiff company were within the said six years at their own expense to erect and finish on the said lands at least 35 houses in accordance with the plans and specifications therein mentioned. The other provisions of this agreement were identical with those of the agreement of the 5th of February, 1877, except that the houses were to be smaller and the rents lower.

By another agreement dated the 27th of October, 1879, and made between the same parties, the provisions of the said two building agreements as to the minimum value of the houses to be erected were varied.

In pursuance of the said agreements the Plaintiff company erected numerous houses on part of the said lands, and were granted leases thereof.

In the year 1882 the Defendant company gave the Plaintiff company notice of their intention to promote a bill in Parliament for the extension of their railway system, which scheme necessarily involved the acquisition by the Defendant company of a considerable portion of the lands comprised in the said building agreements. Under these circumstances the Plaintiff company applied to *M. P. W. Boulton* for an extension of the times within which their building operations under the said agreements were to be completed, which was assented to—no definite extension of the time however was fixed—and thereupon they suspended all further building operations upon the said lands.

On the 31st of July, 1883, the Defendant company, having obtained their new Act, purchased the fee simple of part of the lands comprised in the said building agreements, and bought with express notice of the same agreements.

On the 18th of September, 1884, the Defendant company served the Plaintiff company with a notice to treat for part of the lands comprised in the said building agreements, viz., 4A. 0R. 32P., being in fact slightly more than a third of the whole of the said lands, but the Plaintiff company sent in no claim in answer to the notice.

On the 4th of January, 1886, the Defendant company, without further notice to the Plaintiff company, and without their consent, and without complying with any of the provisions of the *Lands Clauses Consolidation Act*, 1845, entered upon a considerable portion of the lands comprised in the said building agreements, and commenced to execute works for the purposes of their new railway. They did this treating the said building agreements as at an end, and insisting that the Plaintiff company had no interest whatever in the lands comprised therein.

The Plaintiff company thereupon commenced this action, pleading as above stated, and also alleging that the Defendant company when they bought the fee simple of part of the said lands had express notice of the aforesaid extension of the time limited by the building agreements, and that the arrangement was binding upon them; and the Plaintiff company claimed (1) a declaration that as between the Plaintiff and Defendant companies the said building agreements were still subsisting, and that the price and compensation payable to them for the lands taken by the Defendant company ought to be assessed upon that footing; (2) an injunction to restrain the Defendant company from entering on the said lands until they had complied with the provisions of the *Lands Clauses Consolidation Act*, 1845.

The Defendant company in their statement of defence alleged that they purchased with notice of the three building agreements only, and had no notice whatever of any other agreement or arrangement between *M. P. W. Boulton* and the Plaintiff company. They also alleged that they had complied with all their statutory enactments prior to taking possession. Issue was joined and this was the trial of the action. Evidence was gone into at some length as to whether there had been any extension of the stipulated times for completing the buildings, and whether the Defendants had purchased with notice of any such extension—the result of which is sufficiently noticed in the judgment of the Court.

Romer, Q.C., *Warmington*, Q.C., and *Woodroffe*, for the Plaintiff company:—

After a notice to treat a landowner cannot deal with his property so as to cast any increased labour or expense on the company: *In re Marylebone (Stingo Lane) Improvement Act* (1); *Metropolitan Railway Company* v. *Woodhouse* (2). The Plaintiffs therefore would have done wrong to continue their building operations after they received the Defendants' notice, because it would have cast upon the Defendants the obligation and expense of removing the buildings. Then under the agreements, until determined, the Plaintiffs have an interest, in respect of which they are entitled to compensation, and under the circumstances time was not of the essence of the contract. But if it were, it was waived by Mr. *Boulton* continuing to accept rent under the agreements after the stipulated periods had expired: *Ex parte Newitt* (3); and further, the evidence shews that the time was extended by Mr. *Boulton* and that the Defendants purchased with notice of the arrangement. Therefore, the Plaintiffs' licence to enter and build continues until clearly determined, and they are entitled to a reasonable time within which to complete their operations, and they are also entitled to come to this Court to ask for a declaration that their interest in the land under the agreements is still subsisting.

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(1) Law Rep. 12 Eq. 389.
(2) 34 L. J. (Ch.) 297.
(3) 16 Ch. D. 522.

Ince, Q.C., and *O. L. Clare*, for the Defendant company:—

In building agreements time is always of the essence of the contract, and here the onus is on the Plaintiffs to make out an agreement for an extension of the stipulated term, and they have failed to do so. They do not suggest any definite term. What is a reasonable extension of time? Who is to fix it? The Plaintiffs in truth have an onerous contract, which imposes great liabilities on them, and from which they would be glad to be relieved. If ever we go to a jury or arbitrator, they will not get any compensation. But the case is really within the principle of *East and West India Docks Company* v. *Gattke* (1), and *London and Blackwall Railway Company* v. *Cross* (2), where it was held that the Court will not investigate the question of title or no title at this stage of the proceedings, but the claimant must proceed to arbitration under the provisions of the *Lands Clauses Consolidation Act*, 1845, and bring his action on the award of the arbitrator. No doubt those were cases in which the Court refused to interfere at the instance of the company, but there is no reason why the principle should not apply to a landowner as well as to a company. This action, therefore, is misconceived and premature, and the Court has no jurisdiction to entertain it.

KEKEWICH, J.:—

The Defendant company have compulsory powers of purchase under an Act of 1883, of certain property in the neighbourhood of *Birmingham*; and they gave notice to treat in the usual way to those whom they conceived, after the usual inquiries, to be interested in that particular property; and, among others, they gave a notice to treat to the Plaintiffs, the *Birmingham and District Land Company, Limited*. The notice required, as notices to treat always do, a claim to be delivered within twenty-one days, and intimated that if that were not done the company would use the powers given to them by Parliament to have the compensation assessed. No claim was ever sent in. The Defendant company through Mr. *Boulton*, and otherwise, must have known about the Plaintiffs' possible interest in this land; but when they required to take possession of it, they entered into possession—whether by inadvertence or of set purpose it is immaterial to consider—without making the deposit or giving the bond required by the *Lands Clauses Consolidation Act* where a railway company enters adversely. The result was this action, and it had the immediate effect, which was obvious and desired, of procuring a bond to be given. But the Defendant company then denied and they still deny the right of the Plaintiffs to any compensation whatever, not on the ground that the compensation ought to be reduced to zero, but because they have no interest whatever in the land in question. It is said that the Court is not at liberty to consider whether the Plaintiffs have an interest which may properly go to an arbitrator or a jury under the *Lands Clauses Act*, and that there is no instance in modern times of such a question having come before the Court on action, and that is true because it is generally raised under the *Vendor and Purchaser Act*, or money is paid into Court and the question is disposed of by petition, or by an action for specific performance of an agreement for purchase, the arbitrator or jury having fixed the purchase-money; and it is urged that this action cannot be maintained. The answer is that such a case as this very seldom occurs. As a general rule a railway company, when it has by inadvertence omitted to purchase some interest, at once makes reasonable terms and litigation is prevented. But if instead they say, "We will take possession, we deny your interest; we may be bound to give you a bond, because the Court, if you are apparently entitled to some interest, will restrain us from going into possession until we give a bond; but we insist you have no interest at all, and that there is nothing which can go to a jury or an arbitrator," I am aware of no objection on principle or authority to the Court declaring, as between the claiming landowner and the railway company, that the claiming landowner has or has not an interest. And though no doubt there might be better and more expeditious means of deciding the question, yet, when the action has been rendered necessary by the conduct of the railway company in taking possession adversely without the usual precautions, and when that action is before the Court with a claim to have that interest determined, to say, "The Court shall not be able to determine that question now, but it shall go to the arbitrator, and we will reserve all those questions till hereafter," seems to me to be claiming a right to continue a circuity of action and process of delay which in modern times the Court has always set its face against.

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(1) 3 Mac. & G. 155, 173.

(2) 31 Ch. D. 354, 373.

I have been referred to two cases as having established a principle which ousts the jurisdiction of the Court. These are cases in which an injunction to restrain an arbitration has been applied for and refused. The oldest case, which is cited as really determining the principle, is the *East and West India Docks Company* v. *Gattke* (1). There a lessee of some land said that he was entitled, not to have his land bought and paid for, but to compensation under the 68th section of the *Lands Clauses Act*, on the ground that his land was injuriously affected by the works of the dock company, and he said, "I insist upon having that claim decided by an arbitrator." The dock company said, "No, you have no interest at all. A most idle claim this is, and we will take proceedings in the Court of Chancery, and we will have a stop put to this arbitration, which can have no possible result other than putting us to a great deal of expense and trouble." The answer of the Court was, "That is a matter to be considered in the arbitration." It is the right of Her Majesty's subjects to make claims and to have them tried in the constitutional way. If a man chooses to commence an action for any purpose he is entitled to have that action disposed of according to the practice of the Court. So a man who wisely or unwisely chooses to make a claim against a railway company, or dock company, is entitled to have that claim investigated by the tribunal which the Legislature has said shall take the place of the High Court of Justice, namely, an arbitrator or jury, and it must proceed in the usual course. It is the privilege of the claimant, and it is the liability of the company having compulsory powers. Precisely the same principle was affirmed by the Court of Appeal in *North London Railway*

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(1) 3 Mac. & G. 155, 173.

Company v. *Great Northern Railway Company* (1), and it was followed distinctly on the same grounds in the recent case of *London and Blackwall Railway Company* v. *Cross* (2).

I grant there is probably no exception from the rule laid down in these cases, but here I have an entirely different case. Here the company say, "There is nothing whatever to determine. The Plaintiffs have no interest whatever," and the action having been commenced rightly (because the Defendant company has not the slightest excuse, except inadvertence, for entering without making the usual deposit or giving the usual bond), it would to my mind be wrong for the Court to hesitate to determine the question which is now ripe for decision, with sufficient documents and evidence before it. Therefore I have no hesitation in entertaining the claim of the Plaintiffs.

That claim is, to my mind, a simple one, and I cannot help thinking it has been complicated by the introduction of many matters which might conveniently have been left out altogether. There has been a great contest whether there has been an extension of the time limited by the agreements. [His Lordship then considered the provisions of the agreements, and continued:—]

I am asked to hold that the first clause, the license to enter, came to an end absolutely at the end of ten years, unless extended for a particular time, and by a definite agreement, notwithstanding that the lessee would still be entitled to leases of those houses which he had completed. In my opinion this agreement must be read as a whole, and read as a whole it is an agreement by the intended lessees to build certain houses of a certain value in a certain time, and an agreement by the landlord that he will grant leases of those houses when built. It is quite unnecessary for me to consider whether time is of the essence of the contract, or whether the landlord could have entered at the end of the ten years without more, because the ordinary doctrines of equity apply, and anything like a waiver of time would have this consequence that it would be impossible for the landlord to enter except on reasonable notice and after a reasonable time. That is too plain to require further argument. The question is, whether there is a waiver. I have most distinct evidence on the point.

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(1) 11 Q. B. D. 30.

(2) 31 Ch. D. 354.

KEKEWICH, J.

1887

Birmingham and District Land Company v. London and North Western Railway Co.

[His Lordship then dealt with the evidence at some length, and held it to be proved conclusively that the building operations had been with Mr. *Boulton's* consent abandoned for a time, that there had been an actual agreement by him that the building covenants should not be insisted upon, and that the matter should generally stand over until the railway schemes had been developed, and they could know how the agreements could best be carried into effect, and proceeded :—] That being so, it is impossible for me to determine exactly what the Plaintiffs have, but I am clear that they have an interest under these two agreements, which to some extent has been varied by the subsequent agreement of the 27th of October, 1879. Therefore I see no difficulty in making the declaration for which the Plaintiffs ask, that is to say, that these agreements are subsisting. I will take it down to the present time, because, if a reasonable notice to determine was required, I have no evidence that a reasonable notice has been given. I make that declaration, and the actual interest must be ascertained hereafter by the proper tribunal if the parties cannot come to terms.

Solicitors for Plaintiffs: *Robinson, Preston & Stow,* agents for *Rowlands & Co., Birmingham.*

Solicitor for Defendants: *C. H. Mason.*

H. L. F.

WILLIAMS *v.* COLONIAL BANK.

KEKEWICH, J.

1887

July 9, 11, 12, 13.

[1884. W. 677.]

Shares—Pledge of Certificates—Blank Indorsement—Brokers—American Law—Mercantile Usage—Defective Title.

The executors of a holder of shares in an American railroad, in order that the shares might be registered in their names, so as to enable them to receive the dividends and if necessary to sell, signed blank transfers indorsed on the share certificates, and gave them to their brokers. The brokers fraudulently deposited them with a bank as security for advances, and afterwards became bankrupt. According to American law the holder of certificates with transfers properly indorsed has a good legal title to the shares; and according to mercantile usage in *London* such certificates were treated as securities to bearer. In this case the indorsement was not so attested as the railroad company required for registration:—

Held, that the executors must be taken to have given to the brokers authority to deal with the certificates, and that the bank was entitled to hold them.

But *held*, that the executors were not bound to do anything in order to enable the bank to have the transfer registered.

Bankers are not bound to make any inquiry as to securities passing by delivery, which are deposited with them by brokers as security for advances.

J. M. WILLIAMS was the registered owner of 1210 shares in the *New York Central and Hudson River Railroad Company*, for which he held 121 certificates of ten shares each.

The certificates were in the usual form, and each had printed on the back:—

"For value received . . . . do hereby sell, assign, and transfer, to . . . . shares of the capital stock of the *New York Central and Hudson River Railroad Company* of one hundred dollars each standing in . . . . name . . . . on the books of the company, and represented by the within certificate. . . . . And do hereby irrevocably constitute and appoint . . . . attorney to execute a surrender and cancellation of the within certificate, and also to do all things requisite to transfer the said stock on the books of the said company, in such form and manner as may be necessary or be required by the regulations of the said company in that behalf, with full powers of substitution in the premises."

J. M. Williams died in 1880, leaving four executors, of whom two proved on the 25th of March, 1880, and a third proved on the 19th of October, 1882.

The two executors who had proved on the 20th of August, 1880, applied to *W. P. Thomas, Sons, & Co.*, who were stockbrokers, and had been employed by the testator, to get the shares registered in the names of the executors, in order that they might be enabled to receive the dividends, and to sell the shares if necessary. The conclusion to which the Court came as to the intentions of the executors at the time is fully stated in the judgment.

The certificates were then sent by the executors to *Thomas & Co.*, in order that they might be sent to *America*. It appeared that they were sent to *America*, and were returned to have the signature of the executors to the transfers. The evidence as to their title under the will of *J. M. Williams* was also said to be thought insufficient. The two executors signed the indorsed transfers, leaving the blanks not filled up, and returned them to *Thomas & Co.*

In February and April, 1881, *Thomas & Co.* deposited the 121 certificates with the *Colonial Bank* to secure the balance due, or to become due, from them to the bank. In August, 1881, fifty of the certificates were given up to *Thomas & Co.*, and were by them deposited with the *London Chartered Bank of Australia*, leaving seventy-one with the *Colonial Bank*.

In December, 1882, the executors made inquiries of *Thomas & Co.*, and received an answer that the certificates had been sent to the office at *New York* for alteration, and were left there pending instructions from the Plaintiffs in case they desired a sale. The letter concluded: "We need hardly say that there is no risk in leaving the certificates at *New York* as they are not indorsed." At the same time there was some correspondence between the executors and *Thomas & Co.* as to the dividends.

Thomas & Co. were adjudicated bankrupt on the 5th of February, 1884. It appeared that because the signatures of the executors were not acknowledged before a consul of the *United States* or some other officer, the railroad company had refused to alter the registration of the shares.

The executors now brought this action against the *Colonial Bank* and the trustee in the bankruptcy of *Thomas & Co.* alleging that they, the two executors, had signed the transfers on the untrue suggestion of *Thomas & Co.* that by means thereof they might be registered as owners of the shares in the place of the testator; and claiming a declaration that the deposit of the certificates was made in fraud of the Plaintiffs, and conferred no title on the bank; and claiming delivery to the Plaintiffs of the certificates, and an injunction to restrain the bank from applying for any alteration in the books of the railroad company, and from dealing with the shares or certificates.

The *Colonial Bank* alleged that they accepted those certificates as security in the belief that they belonged to *Thomas & Co.*, and that the usage of bankers and others was to pass the property in these shares by delivery of the indorsed certificates, which by American law were negotiable securities. That the blanks in the transfers could be filled in by the holder, and the railroad company would register the person so nominated as owner of the shares. That the executors had impliedly given *Thomas & Co.* power to pledge the shares and fill up the blanks. That it was the ordinary business of stockbrokers to pledge shares for their employers. And by way of counter-claim the bank claimed a declaration that they were entitled to a valid charge on the shares, and that the executors ought to be ordered to do all things necessary for vesting the shares in the bank.

There was a similar action against the *London Chartered Bank of Australia*, with whom *Thomas & Co.* had deposited the fifty certificates. But the *Chartered Bank* did not counter-claim.

The evidence of experts in *America* was taken by commission, and in the opinion of the Court it was shewn that by the laws of *New York* the holder of certificates indorsed had a legal title to the shares without registration. The evidence of stockbrokers and others was given in Court that these certificates passed from hand to hand in *London* and were considered to confer a title. The effect of the evidence is fully stated in the judgment.

The two cases were heard together.

Finlay, Q.C., *Warmington*, Q.C., and *D. Sturges*, for the Plaintiffs:—

No doubt an indorsement of a negotiable instrument by executors would be good, but these certificates are not negotiable instruments and the legal estate is still in the executors. As to their being estopped from denying the right of *Thomas & Co.* to pledge the securities, that can only arise if the executors knew that the title would pass by delivery. The executors gave the certificates to *Thomas & Co.* for one purpose only, viz., to have the registration altered. If the clerk who was given the certificates to take to the office had raised money on them, would that have been held good, and would the executors have been estopped from denying his right to pledge the shares? If the bank chose to take these certificates without reference to the executors it was at their own risk: *France* v. *Clark* (1). In *Goodwin* v. *Robarts* (2) the facts were quite different. The bank must have known that the shares did not belong to *Thomas & Co.*: *Rumball* v. *Metropolitan Bank* (3).

Rigby, Q.C., *Reid*, Q.C., and *C. James*, for the *Colonial Bank*:—

The executors indorsed the certificates and sent them to their brokers to be either registered or sold, and knew their position. For estoppel positive negligence need not be shewn; it is enough that power is given to the wrongdoer. But here there was negligence, as the certificates were left from 1881 to 1884 without inquiry. In *Gordon* v. *James* (4) much more care had been taken. These are American securities and must be dealt with according to American law, which is, that when once indorsed they pass from hand to hand, and that the legal title is in the holder who can get them registered after filling up the blanks, which he has power to do. *Goodwin* v. *Robarts* is exactly like this case: *Easton* v. *London Joint Stock Bank* (5). In *Colonial Bank* v. *Whinney* (6) and *Société Générale de Paris* v. *Walker* (7) the indorsements were similar. The case comes within

(1) 26 Ch. D. 257.
(2) 1 App. Cas. 476.
(3) 2 Q. B. D. 194.
(4) 30 Ch. D. 249.
(5) 34 Ch. D. 95.
(6) 11 App. Cas. 426.
(7) 11 App. Cas. 20.

the rules laid down in *Willmott* v. *Barber* (1) and in *Carr* v. *London and North Western Railway Company* (2). We are entitled to be treated as absolute transferees of the shares and to have our title completed if anything more is required.

G. W. Lawrance, for the trustee in *Thomas's* bankruptcy.

Latham, Q.C., and *T. H. Wright*, for the *Chartered Bank*:—

The indorsement was appropriate for a sale but not for registration, and the executors left the certificates in the hands of *Thomas & Co.* for three years without troubling themselves. If the bank had inquired what would they have been told?

Finlay, in reply:—

There are two distinct questions. First, what is the effect of this instrument, assuming that the executors are held to have authorized the deposit? Secondly, whether the executors are estopped from denying that they authorized the deposit? As to the first, it was said that, except for the purposes of voting and being able to sue for dividends the transferee by indorsement takes to all intents the legal and equitable interest. But for that purpose the instrument must be complete, so as to entitle the holder to go to the company and have his name registered. These certificates are not complete, and several witnesses say that they would not have taken them as security, and there is evidence that there is a difference as to the indorsement when it is by executors who would have to give proof of their title. In fact the railway company has refused to register the transfer. How then can it be said that these banks have the complete legal and equitable title? If they have why the counter-claim? As to estoppel: it never applies unless the instrument is negotiable. The conduct of *Thomas & Co.* amounted in fact to larceny, and the executors cannot be estopped from shewing the fraud. As to estoppel, the English law must govern the case, and American law does not apply though the instrument is to be construed by American law. A bank has no right to assume that a broker can raise money on shares which presumably do not belong to him. These are not securities on which money is habitually lent.

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(1) 15 Ch. D. 96.

(2) Law Rep. 10 C. P. 307.

KEKEWICH, J., said that there were no questions of fact in the ordinary sense of the word, but that there were important questions as to the usages of the monetary world, and as to American law, which must be treated as questions of fact. The evidence as to the American law was summed-up intelligently and accurately by Mr. *Choate*, one of the expert witnesses: "In American law the legal title to shares rests in the person who for the time being is the only person entitled to have them upon demand duly registered in his name as the legal owner thereof. There are cases in which the rule obtains in American law that between persons who have equal rights in equity the right of the person having the legal title prevails, but such a proposition is of rare application, and I do not see that it can be applied to the question of title to stock acquired in any such way as has been indicated in this examination hitherto. According to the law of *New York* a person who is not on the register of shareholders may have a legal title to shares in a company." [His Lordship then proceeded:—] Taking that to be a fair statement, it follows that the American law does recognise that which English law does not—a legal title existing without legal ownership. Mr. *Choate* distinguishes between legal title and legal ownership. According to English law there is no such possibility. A man cannot be the legal owner unless he has the legal title, according, at any rate, to the ordinary employment of the words "legal title." That, however, is his definition, and I think that it is a definition which I must keep in my mind in considering the rest of the case.

Looking at the question from that point of view it divides itself into legal title as between the company and the person claiming that title and legal title as between different persons claiming shares. The legal title as against the company is, as I understand, settled entirely by that statement. A man having such an indorsement as we have in this case, may go to the company and say "I am entitled to be registered as the legal owner," and if he is in that position he has the legal title, and he holds it as against other persons who have not got such an equity to displace the legal title as one passage I have read in Mr. *Choate*'s evidence points to as sometimes occurring.

That, to my mind, is the only question as regards the ownership of the shares which depends on American law. There is indeed a question what is the meaning of the certificate; what is the meaning of the indorsement before it is filled up, and what is the effect of the indorsement when filled up. But this latter question is really the same as the question about the legal title. The meaning of this document, both on its face and on the back, is a question to my mind entirely of American law, and I am not at liberty to construe it as if it were an English document, and without the aid of the evidence of experts in *America*. If I were to construe it as an English document it is unnecessary to say how I should construe it, but I certainly should not construe it in the way in which the American witnesses have said that it is construed in *America*. I must take their evidence, and I have no doubt that Mr. *Choate* has correctly stated what is the law in *America* on the subject.

I am asked further to consider as a question of American law whether the Plaintiffs are estopped in this case; that is to say whether they are prevented from insisting upon what in their point of view is the correct version of their conduct in the matter. To my mind American law has nothing whatever to do with that. It seems to me to be a question of conduct, a question of representation or absence of representation to be decided by an English Court respecting events which occurred between persons resident in *England* and carrying on business in *England*.

Having cleared the ground in that way of the questions affected by the American law, I will proceed to get rid of one or two other matters which have no real bearing on the main questions in dispute, though they are necessarily mixed up with it, and have necessarily led to some discussion.

In the first place we have had a good deal of evidence, both in print and in the witness-box, of what is held to be a good delivery. Now, to my mind, what is or is not a good delivery does not directly, and I doubt whether it does indirectly, affect any question in the case. Stockbrokers, bankers, and other men of business will not in the hurry of their business do what cannot be done consistently with that hurry—I am using "hurry" as meaning "rapidity" or "promptitude." They will not wait to get proof. If you present to a man a document which requires some evidence to prove its genuineness he declines to meddle with it because that would take time, and not only take time but perhaps involve him in difficult inquiries which would send him to his lawyer or to some other expert in that particular line to get information on a point about which he himself is not sufficiently informed. Therefore among business men such as stockbrokers it is held for their common convenience that one man shall not be at liberty to force on another in fulfilment of a contract a document, whatever it may be, which involves him in a difficult inquiry, and possibly some risk. This is not really the question in this case. Whether these particular certificates pass from hand to hand as securities to bearer is to my mind an entirely different question from whether there would be a good delivery under circumstances such as exist here or under any other circumstances.

Again, I think that I may forget any distinction between a registered owner and the executors of a registered owner. The evidence proves what I might assume without evidence that the legal personal representatives of a deceased registered owner, constituted by the proper Court in a proper manner, have precisely the same powers of disposition which the registered owner himself had; and if an indorsement by the registered owner be sufficient, an indorsement by the executors is equally sufficient, and there is no difference between the two. The only questions which come in are, who are the legal personal representatives, and whether they have been constituted by a proper Court. Are they the legal personal representatives for all purposes? Those are questions of law to answer which possibly involves inquiry into facts, but when once it has been ascertained that they are the executors in the common sense of the word, all that difficulty is got rid of, and an indorsement by the executors is precisely equivalent to an indorsement by a registered owner. I do not think that the case is in the slightest degree complicated on one side or another by any distinction between executors and a registered owner.

I now pass to the conduct of the executors, and what they intended to do. These gentlemen had these 1210 shares in this American railroad company, and in the discharge of their duty to the estate they were minded to do whatever was needful in order to get themselves placed in the position of owners, so that they might sell them if they wished, and at any rate might draw the dividends, which they could not do, because the power of attorney executed by their testator had, of course, ceased to have any effect on his death. They corresponded with Messrs. *Thomas & Co.* on the subject. There is not any indication in the first instance of a wish to sell. One might presume not necessarily a wish, and certainly not an intention to sell, but an inquiry whether it would be desirable to sell or not. I do not know what the terms of their trust were, or whether there were any terms at all; but the executors would be bound in dealing with these securities to inquire whether they were securities which they ought to hold, and I assume that the idea of selling presented itself to their minds, but they did not in the first instance wish to sell. Then they were told, and told rightly, that the certificates must be sent over for registration. The indorsement of the certificates in the first instance seems to have been neglected, and it is singular that Messrs. *Thomas & Co.*, who were at any rate brokers of large experience, did not know what every one who has listened to this case knows, that the certificates would have to be indorsed, and that some formalities would have to be complied with beyond merely sending over the certificates for registration. However, although it is not proved, I gather that the certificates were sent over and were returned, and the objection was that there was no signature at all. At last, after some correspondence, on the 29th of January, 1881, Mr. *Pryor*, the agent of the executors, writes to Messrs. *Thomas*, "I now beg to return 121 *New York Central* certificates for 1210 shares, signed by the executors, by which kindly do the needful, and acknowledge the receipt." Pausing there for a moment, I might mention this, that probably not on the same day (that is immaterial), but when they were sent with that letter they were signed by the only two executors who had then proved. The third executor out of four had not proved, but did prove afterwards, when, as I understand, he attained his majority. The certificates were signed then by the only two executors who had proved. Whether between that date and some other date or between other dates the third executor had proved is to my mind

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utterly immaterial. The two executors were then in the position of legal personal representatives of the deceased, and what they did then operated to bind the estate, whatever happened afterwards as regards the other executor, who as a matter of fact does not seem to have interfered in the least. The certificates were sent to Messrs. *Thomas & Co.* simply, as I hold, on the construction of the correspondence, for the purpose of seeing that the registration was changed in *America*. It is important to remember that there was a contemplation then, not merely in their minds, but expressed by the executors in their letters, of selling, and they were aware that the signature which was required for registration would also suffice for selling, so that "once signing," to use Mr. *Pryor's* own expression, would do. Still my construction of the correspondence is that the sale was only a thing contemplated as possible, upon which they were to arrive at a decision on some future occasion, and that the certificates were only placed in the hands of Messrs. *Thomas & Co.* for the immediate purpose of registration. We know that they never fulfilled that purpose, and that the certificates were never sent to *America* for registration, and there can be no doubt—it has not been suggested to the contrary—that Messrs. *Thomas*, or the partner in the firm who represented the firm in doing what he did, acted entirely contrary to his instructions and in fraud of his clients. If that consideration could determine the case, there could be no question what the determination would be. As a matter of fact he did nothing in fulfilment of his instructions, and, for some reason which has not been explained, though some explanation was attempted, the executors lay idle for a considerable time, and Mr. *Rigby*, without wishing to impute negligence to the executors, has pointed out that this delay may fairly be taken into consideration in weighing the merits and demerits of the Plaintiffs' case. I should be very unwilling to say a word which would impute negligence to these gentlemen, because I have not the *cestuis que trust* here, and I do not know what claim may be made against them, if unfortunately there is a loss to the estate. Therefore, in saying that I do not think that any negligence is proved, I mean precisely what I say, and no more and no less. I am not satisfied that the delay which occurred, and which is certainly unaccounted for, was the *causa causans* of what happened, nor even that it was the *causa sine qua non.* The deposit with the *Colonial Bank* was made early in 1881, and even if the executors had written and urgently demanded information, mail by mail, there is no doubt that the *Colonial Bank* would have insisted on their securities. The *Chartered Bank* would never have had theirs, but no other alteration would have been made in the case at all. Therefore I cannot rest my decision of this case in the least on the negligence of the executors, nor can I say that there has been any negligence which has led to what has occurred. I am at a loss to know what executors in such a position could have done different from what they did in 1881, and I am not going to inquire further into the delay. They were bound to get these shares registered either in their own names or in the name of some purchaser from them; and what were they to do but intrust them to brokers of standing and reputation—brokers who had been trusted by their own testator? If unfortunately they have suffered for their confidence in Messrs. *Thomas & Co.*, as many other persons have suffered, it seems to me to be the result of a proper transaction on their part, and not of any fault of theirs. Messrs. *Thomas & Co.*, as a matter of fact, treated these shares as their own, and deposited them with the *Colonial Bank.* I may leave the *Chartered Bank* out of the case, because the deposit with them was not made till afterwards and comprised only some shares (500) which had been released by the *Colonial Bank*, and I do not think there is any difference between the two cases. The shares were deposited, and there the shares are now; and the *Colonial Bank* say that they are entitled to hold those shares as the legal owners, and to insist upon their legal title, according to American law, by way of security for the moneys which they advanced on the shares. What moneys were advanced has not been gone into, and may require some careful investigation, but they insist on their title as pledgees or mortgagees.

Now, in order to determine that claim I have to consider these two questions, first, what is the evidence as regards the usage of the monetary world respecting documents of this kind, and then I have further to consider, supposing that the usage establishes what the *Colonial Bank* say it does, whether the executors are bound by that usage so as to be deprived of the shares forming part of their testator's estate.

As to the usage of the monetary world I shall not refer to anything but the evidence of bankers, brokers and others, and in referring to their evidence I strike out of my mind all that they have said about the law of the case. I do not consider a banker or a broker either in this country or elsewhere a good witness on a question of law. He is a good witness on matters coming within his own cognizance with which he is presumably familiar, that is to say, anything connected with the custom of merchants, but I do not consider such evidence receivable on any question of law. Of course I am speaking of foreign law. On this question I do not think it necessary to refer to the American evidence further than I have already referred. The evidence of the banker and brokers in *England* is quite sufficient for this case. I do not say that the evidence from *America* is not admissible, for evidence from *Paris* or *Vienna* or elsewhere would be admissible. But I do not think the evidence of *New York* brokers more valuable than the evidence of a *Paris* broker would be. The question is not as to the custom or usage in a particular place, but what is the custom or usage of the monetary world. For that purpose proof of the usage of a large capital such as *London* is sufficient to shew that of the whole world unless it is contradicted. As it happens we are told that there is no difference between the American evidence and the English evidence, but I am content to take the English evidence. Now to my mind it is proved beyond dispute that, whether rightly or wrongly as a matter of law, whether wisely or unwisely I ought not to inquire, and I do not inquire, merchants (using that word to mean all who are engaged in commercial transactions) do regard documents of this character as passing from hand to hand, or, what I think is the better expression, as equivalent to securities to bearer. I have evidence that such instruments will sometimes for many years pass from hand to hand without registration; and that by some arrangement the registered owner authorizes some one to receive the dividends, so that they come to the person holding the certificate. That is the merchant's view, and they run any risk that may be incident to that proceeding. As of course at the bottom of all there is the confidence in the customer who applies for the advance. The only blot in the evidence is, that no one remembers an instance of certificates indorsed by executors. [His Lordship then expressed his opinion that any difficulty on that ground would have been got rid of.]

Therefore I think I am bound to hold that according to the usage of the monetary world these documents have for a long time past been accepted as securities to bearer, on which bankers make advances. I do not think that the *Colonial Bank* was in any way put upon inquiry by the fact that *Thomas & Co.* were brokers. It is with brokers that these banks deal. They know that brokers very frequently raise money for their clients without disclosing the names. It is part of the usage, and if a Court were to hold that whenever a broker tenders securities the bank is put upon inquiry, it might or might not conduce to stricter dealings, and might or might not be a good thing for the commercial community, but it would certainly overrule many cases which have gone on the opposite principle. Nor do I think that the bank was put upon inquiry by the fact that the holders were executors. I have already dealt with that point, and I will not repeat what I have said.

Holding, then, the *Colonial Bank* to have acted honestly and not to have been put upon inquiry, I come to the real question—whether the executors are, as the phrase is, "estopped" from denying the title of *Thomas & Co.* to pledge these shares. They were dealing with documents which though not negotiable in the strict sense of the word were, as I say, equivalent to securities to bearer, and they must be taken to have known the nature of the securities which they held, and they must I think be taken to have given to their agent (not as Mr. *Finlay* suggested their clerk or messenger), but to their broker, who was the proper person to deal with these things, all that authority which by the law merchant went with the particular instrument.

I am not sure whether the word "estopped" is precisely the right word to use in these cases, but it has been used in many of them and I think it is sufficiently understood. It is not used here in the strict technical sense of the word, as it cannot be suggested that the executors are precluded from asserting the truth. On the contrary, my judgment goes on an examination of the real facts. What they are precluded from asserting in my judgment is that Messrs. *Thomas* were not by the custody of these documents with their assent authorized to deal with them as they from time to time considered desirable. *Thomas & Co.* might have been intended to sell them, and it seems to me to have been a necessary incident to the authority that they should be able to part with them in any manner which they thought necessary. That is to say, the executors had confidence in Messrs. *Thomas* in the same way as the bank had confidence in Messrs. *Thomas;* unfortunately the confidence was misplaced in both cases, but the confidence was placed, and, as I have already said, I think placed rightly, by the executors. I do not know what really they could have done more. They did authorize *Thomas & Co.* to do what *Thomas & Co.* thought necessary, and unfortunately *Thomas & Co.* did what they ought not to have done, and what they were not intended to do, and parted with these securities, not for the purpose of registration or for the purpose of sale, but for the purpose of raising money on their own account. I think that the executors when they signed these certificates and sent them to *Thomas & Co.* for the purpose expressed in their letters did enable them and intended to enable them to represent to any one whom it concerned that they had appointed Messrs. *Thomas* their nominees and attorneys, and that Messrs. *Thomas* were at liberty to dispose of the shares in whatever manner was required. I think that the executors cannot now deny that authority, and that it was a representation to the *Colonial Bank* made by their signature that Messrs. *Thomas* had the control of the certificates.

That being so I must come to the conclusion that the executors cannot succeed in this action, and that the *Colonial Bank* and also of course the *Chartered Bank* have a charge on these certificates for the moneys advanced with interest and costs, that is to say, the rights of an ordinary mortgagee, and it follows that they are entitled to have an account taken. It does not necessarily follow to my mind that they ought to have any other relief. The banks have taken the certificates and they are entitled, as I say, to hold them, but there is no contract whatever with the executors. The executors have entered into no bargain with these banks. The executors have not undertaken to do anything more than was necessary, and have not said that they would get this indorsement acknowledged before a *United States* consul or any other officer. Therefore, although holding that the banks are entitled to a charge on the certificates and therefore are entitled to enforce that charge, if they can, by obtaining registration in *America*, I do not think that any case has been made for compelling the executors to do anything more than they have done. That is asked by the *Colonial Bank's* counter-claim, it is not asked by the *Chartered Bank.*

My judgment therefore will be a declaration that as regards 710 shares the *Colonial Bank* and as regards 500 shares the *Chartered Bank* are entitled to a charge for the moneys advanced on those securities and there will be an account of what is due in respect of those advances. I do not propose to go further beyond that than to give liberty to apply. If, when the accounts have been taken any further application is necessary it can be made under that liberty, but I express distinctly my own opinion that the banks are not entitled to say, "Now you must either redeem me or you must complete my legal title by giving me the means of getting myself registered in the books of the company." If the banks cannot get that done without the assistance of the executors they are not entitled to it at all. I do not think I ought to say anything more on that point, which has been considerably discussed in the evidence. Counsel for both banks have averred at the bar that they have no doubt that they can get the registration in their own names at the proper time. I have formed my own opinion upon it, but it being a question of American law, and one which it is not proper for me to decide, I think I ought not to say anything more on that subject.

Solicitors for the Plaintiffs: *Young, Jones, & Co.*
Solicitors for the *Colonial Bank: Druces & Attlee.*
Solicitors for the *Chartered Bank: Freshfields & Williams.*

C. M.

KEKEWICH, J.

1887

July 28, 29.

BARONESS WENLOCK *v.* RIVER DEE COMPANY.

[1886 W. 1293.]

Lands Improvement Company — River Company —Restricted Power of borrowing—Restriction inferred—Overriding Restriction—Invalid Charge—Power of Corporation—Assent of all the Members.

The *River Dee Company* was by Act of Parliament empowered to borrow upon mortgage of lands of the company any sums not exceeding £25,000. The company had, however, borrowed more. After this the *Lands Improvement Company* having by its Acts powers to advance to landowners money for the improvement of land advanced to the *River Dee Company* £6405, and by an order the Inclosure Commissioners purported to charge the lands of the *River Dee Company* with the repayment of that sum and interest by annual instalments:—

Held, that the powers given by the *Lands Improvement Company's* Acts did not override the restriction on the borrowing power of the *River Dee Company*, and that the charge on the lands of the *River Dee Company* was invalid:

Held, that a clause in one of the *Lands Improvement Company's* Acts making the certificate of the Inclosure Commissioners conclusive evidence of a valid charge under the Act did not render such a charge valid.

Where by an Act of Parliament a corporation is empowered to borrow a certain sum of money a restriction against borrowing more will be implied.

Where a corporation is created by Act of Parliament, and by Act of Parliament restrictions as to the dealings with its property are imposed upon it, the assent of every individual member of the corporation will not make valid as against the corporation that which it was restrained from doing.

THIS was an action to give the Plaintiffs, the executors of Lord *Wenlock*, the benefit of a charge alleged to have been given by the *River Dee Company* to the *Lands Improvement Company*.

The *River Dee Company* was constituted by the Act 14 Geo. 2, c. 8, and was regulated by that and subsequent Acts. By one of them, 14 & 15 Vict. c. lxxxvii. s. 24, it was enacted that it should be lawful for the company to borrow upon mortgage of the lands of the company any sums not exceeding in the whole £25,000. The clause is set out in 10 App. Cas. 359.

The *River Dee Company* had borrowed from the *Rock Life Assurance Company* £60,000 on the security of a mortgage of lands of the company, dated the 22nd of June, 1870. In 1878, Lord

Wenlock, who had in 1873 advanced £85,000 to the *River Dee Company* on the security of a mortgage of their lands took a transfer of the mortgage to the *Rock Life Assurance Company*. In an action brought by the executors of Lord *Wenlock* to enforce his securities it was held by the Court of Appeal that the company was prohibited from borrowing more than £25,000, and judgment was given for the executors for £25,000 and interest, and for so much of the sums advanced by Lord *Wenlock* as was employed in payment of any debts and liabilities of the company properly incurred (1). This judgment was affirmed by the House

(1) In the Court of Appeal, May 9, 1883.

BARONESS WENLOCK *v.* RIVER DEE COMPANY.

LORD ESHER, M.R.:—

In this case Lord *Wenlock's* executors have brought an action against the *River Dee Company* in order to recover a very large sum with interest upon a covenant contained in a mortgage deed, and it is undoubted that Lord *Wenlock* did advance a very large sum upon a mortgage which was given to him under the seal of the company and upon a contract which those who in fact made it with him represented to be a contract with the company. The defence is, that although the money was in fact advanced upon such representation, namely, that it was money to be advanced to the company, and although the mortgage and the covenant are a mortgage and a covenant under the seal of the company, yet that the company is not liable to this action substantially in covenant, because it is alleged by the company that those who made that covenant and who made that mortgage had no authority to bind the company by the use of the seal for that purpose. If that defence be a valid one there can be no doubt about the hardship thereby inflicted upon Lord *Wenlock*, and in this case a hardship much greater than usual, because this is not simply the case of directors either wilfully or inadvertently doing that which, if it were upheld, would bind a number of shareholders who are not directors, but actually in this case if this covenant and this mortgage cannot be upheld it is a covenant and a mortgage made by people who are said to be the agents of the company, but who in truth and in fact are the only persons interested in the company. It is as if all the shareholders of the company were to make this representation and obtain money and then put forward the defence when an action is brought against the company, that although they, the shareholders, had misled the person into advancing his money, nevertheless the company is not liable. If this action were really the defence of those who induced Lord *Wenlock* to advance his money upon the representation made by them—if this action is defended in the name of the company by them—I hesitate to express the feeling which I have as to such conduct; but if this action is really defended, although in the name of the company, on behalf of the *Crédit Foncier*, I can pass no opinion upon whether it is a just or righteous defence or not, because I know nothing of the circumstances under which they of Lords (1). The amount chargeable was to be ascertained by a referee. Amongst the sums claimed by the executors was a

became the persons having the command of this defence. The question of whether those who actually made the arrangement with Lord *Wenlock* had the authority of the company seems to me to depend upon what is the proper construction of the Act of Parliament which incorporated the company.

The origin of this company has some peculiarity, but I confess that to my mind that which was partly relied on as differing this case from others is not a subject which can be relied upon except to a small extent. It is said that the undertaking to carry out which the company was formed was originally the undertaking of an individual, and that the fact of the company being formed to take over his undertaking ought to induce us to consider that the company was not originated as it were by the Act of Parliament, and could gather to itself any of the attributes which belonged to the individual. I cannot adopt that view. Whether a company is formed by statute of individuals who have no peculiar character or position, or is formed of people to carry on an undertaking which private persons were carrying on before, seems to me to make no difference in the construction of the documents which form the company. It seems to me that we must look at the Act of Parliament which formed the company, and that the only effect which can be given to the fact of an individual having been the undertaker is to see whether in the Act of Parliament there is by reference brought into the Act and therefore into the powers of the company anything which was a power of the individual. But that is in other words only bringing those powers by reference into the statute and reading the statute as if they had been written in it.

The question raised upon that statute is, whether the company had by it a power to borrow money either on covenant or on a mortgage containing the covenant. On the one side it was argued that where a company or corporation is formed by a statute, then from the mere fact of its being made a corporation it has *primâ facie* a right to borrow money to any extent just as an individual might, and that you ought not to cut down that *primâ facie* power unless you can find something either express or by necessary implication in the statute which diminishes that power. On the other side it was argued that when a corporation is formed by statute or otherwise the corporation has *primâ facie* no power whatever to borrow, and that you cannot assert that it has such a power unless you find something express in the statute by which it is formed, or something which by necessary implication gives it the power. I myself incline to think that neither of those arguments is valid. If the one is more valid than the other I incline rather to the latter of the two, but it seems to me that neither of them is valid, and that when you have to consider the borrowing powers of a corporation which has been formed by statute or otherwise, the matter depends entirely upon what is the sum of £6501 as a liability discharged out of the moneys advanced by Lord *Wenlock* under the following circumstances :—

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(1) 10 App. Cas. 354.

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construction of the statute or document, and you have to see whether there is power given to the company either expressly or by reasonable implication. If a company or corporation is formed for the purpose of a particular undertaking, which undertaking it is obvious cannot be carried out without the expenditure of money, and if by the statute or document no means are given to the company which will give them money in hand, or will give them express power to raise money, it seems to me that a reasonable implication would necessarily arise that they must have power to borrow, because otherwise the statute which created them is a futile document, it would pretend to give them powers to do things, but would give them no means of doing those things. Therefore if there were no powers in this original statute, or in what has been called the original statute, by which this company could have money in hand, or by or under which they could have the means of doing what the statute says they are formed to do, I should have inferred that they had power to borrow, and in that case I could see nothing to limit that power to borrow. It must have been the same as a power to an individual, or at all events it must have gone to the full extent of what could have been reasonably necessary for the purpose of carrying on the undertaking. But where in the statute or other document which forms the company you find that means are put into the hands of the company—that is, either by raising capital or by calling up more capital, or by a limited power of borrowing, or by any other way, as by a power to sell lands—which may be within reason sufficient for the purpose of enabling them to carry on the undertaking, then it seems to me that no Court can measure whether those means will in the event be absolutely sufficient or not. Those means being put in their hands you cannot infer that they have at the same time the power to borrow. Under these original statutes this company being formed for a particular purpose first of all had a capital given to it, and, secondly, it had power to raise money by calls, that is really by the issue of new shares to an extent of 20 per cent. beyond that capital. Inasmuch as these lands were given to the company as a reward for what they were to do, and were given to them and their successors in fee (although these lands if they were sold by them would nevertheless be subject in the hands of a purchaser as well as in their hands to certain rights of the Commissioners if the navigation were not properly made, or not properly kept up) to a great extent, more or less, this company had the power of selling lands and bringing the proceeds of those sales into the company, so that those proceeds would be further capital in their hands for the purpose of carrying on the undertaking. Therefore this company had means more or less in its hands, and applying to this company the proposition laid down by the Lord Chancellor in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* (22 Ch. D. 70) in which he says, "There is also no doubt, that where there is not an express prohibition against borrowing in a case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be

The *Lands Improvement Company* was carried on under 16 & 17 Vict. c. cliv. and subsequent Acts, the business of the company properly incident to the course and conduct of the business for its proper purposes" it seems to me that you cannot say that it is necessarily incident to the purposes of this company that they should have had by those former Acts a power of borrowing, either to an unlimited extent or, at all events, to the full extent of anything they might have required for the purposes of the company. I think, therefore, that you cannot in the first Act or in any of the subsequent Acts infer any power in this company to borrow money either upon covenant or loan, or upon mortgage containing a covenant. But then we must see whether the company has power to borrow to any extent. It was substantially admitted that this company has power to borrow upon mortgage containing a covenant to the extent of £25,000. After hearing what Mr. *Davey* said I do not think it necessary to inquire further into the argument that even though they had power to mortgage they had not power to borrow money upon a covenant in a deed of mortgage. It seems to me that they had, and therefore to the extent of £25,000, but to that extent only, those who were acting for this company had power to borrow on mortgage containing a covenant, and that being so, they having borrowed money from Lord *Wenlock*, although they exceeded their authority when they borrowed more than £25,000, to the extent of £25,000 they did not exceed their authority, and the company is bound. Therefore Lord *Wenlock*, taking this to be an action on covenant, is entitled upon that covenant, and in respect of that covenant, to recover to the extent of £25,000, and the proper interest calculated in the ordinary way. But when we have to deal with the money which was obtained from Lord *Wenlock* on this covenant given in the name of the company and under the seal of the company, but beyond the authority of those who so borrowed the money in the name of the company, it is clear that the Plaintiffs, as to that, cannot recover by action on the covenant, because the covenant is an unauthorized covenant beyond the extent of £25,000. The Plaintiffs may recover in respect of some other right, but there is no right which can bind the company at law according to the common law of *England*, therefore their right, if any, is an equitable right. I shall not pretend to go further with regard to the equitable right than to say that if any of the money borrowed in this way from Lord *Wenlock* has been expended in paying proper debts of the company then, although those who received the money from Lord *Wenlock* were not authorized to bind the company, yet Lord *Wenlock's* representatives may in equity recover from the company so much of that money as was expended in paying debts of the company. It was not proved at the trial, and has not yet been proved, whether any part of the money beyond the £25,000 was so expended, but inasmuch as under the *Judicature Acts* so much might have been recovered in this action without bringing in any other parties, it seems to me that that evidence ought to have been given at the trial, but as it was not given at the trial, we have the right to order that it should be inquired into, and if it can be shewn upon such an inquiry that any such debts were paid by being to advance to landowners for the improvement of their estates money repayable by annual instalments (1). The *River*

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money borrowed from Lord *Wenlock* beyond the £25,000, the Plaintiffs are entitled to so much of Lord *Wenlock's* money beyond the £25,000 as has been expended in those debts. In other words, that as to the £25,000 the Plaintiffs would stand on their own right at law, and as to the debts which had been paid with Lord *Wenlock's* money they will stand as it were in the rights of the creditors who have been thus paid with Lord *Wenlock's* money.

Owing to very many peculiarities in this case several other equities have been suggested as equities to which Lord *Wenlock* was entitled, both as against the company and as against what may be called the shares, and as against individuals who may be

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(1) 16 & 17 Vict. c. cliv., s. 4: "The word 'person' shall denote and include any body corporate, whether aggregate or sole, and whether lay, ecclesiastical, or collegiate, as well as an individual."

Sect. 32. "Any landowner may enter into a provisional contract with the company for the execution by the company of any of the said improvements on any land in which he is interested; and the money or contract sum for which the company shall agree to execute such improvements may, with such assent of the Inclosure Commissioners as hereinafter provided, be charged as an improvement loan on such land. . . ."

Sect. 53. "The execution by the Commissioners of any charge on lands in pursuance of this Act shall be, both at law and in equity, conclusive evidence, to all intents and purposes, of the contract to which such charge relates having been duly entered into by the proper parties, and of all acts and proceedings by this Act directed with reference to or consequent on such contract having been duly had and done, and of such charge having been duly made and executed, and being a valid charge under this Act on the inheritance of the lands appearing to be subject thereto."

18 & 19 Vict. c. lxxxiv., s. 3: "The word 'land-owner' in this and the recited Act shall, as to lands in *England* or *Wales*, denote the person who shall be in the actual possession or receipt of the rents or profits of any land . . ." (with the exception of certain leaseholds).

Sect. 12. "When a provisional order for charging any lands to be improved has been made, and the Commissioners are satisfied that the works of improvement contracted to be executed, or some part of such works, have been properly executed, the Commissioners shall execute a charge under their hands and seal upon the inheritance or fee of the lands improved, or to be improved, or some sufficient part thereof, for the whole amount by the contract agreed to be charged on the land to be improved . . . . , to be paid with interest to the company, and every such charge shall be by way of periodical payment, extending over a term of years to be fixed by the Commissioners. . . . ."

22 & 23 Vict. c. lxxxii., s. 3, defined the improvements, drainage of land, inclosing land, erection of buildings, &c.

Dee Company obtained from the *Lands Improvement Company* a loan of £6405; and by an absolute order, dated 31st of December,

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brought in. We have listened to this case with all the attention we could, and I must say, so far as I myself am concerned, with the utmost anxiety to enforce, if I could according to law, Lord *Wenlock's* rights as against this company; this company being assumed by me for that purpose to be in truth, although it is not in contemplation of law, the very people who borrowed this money from Lord *Wenlock*, and who are setting up this defence. I only feel myself bound not to give way to any feeling so far as to do that which I cannot see is according to law. But I should have been anxious if possible to find that I could according to law have made this company repay Lord *Wenlock*; assuming, as I say, this company to be the people who borrowed the money from him in the way in which it was done. But with regard to these other suggested equities it might well have been that this Court should have exercised this power of bringing in the other parties, and of ordering further inquiries to be made, which might raise the question of whether the suggested equities could be upheld or not. I gather, however, from Mr. *Rigby* that he, with all his great experience, seemed rather to think that it would be safer for his clients not to proceed in that way, but to proceed by means of a new action, as his clients may be advised, either against the company or against other individuals, or against the company and other individuals, and he thinks it safer for his clients that we should give a judgment as between Lord *Wenlock* and the company alone, without the presence of other parties, reserving to him the right, without prejudice by this judgment, to consider whether his clients will bring an action either against the company alone or against other individuals alone, or against the company and other individuals, in respect of any other equities than those which are dealt with in this judgment. Therefore it seems to me that it is better for us to give the judgment which I for my part have now disclosed as the judgment which I am prepared to give.

Then, if that be the judgment, it is a judgment in favour of Lord *Wenlock* to the extent of £25,000 and interest, if any can be allowed according to the ordinary rules, and for any debts, if there be such debts, of the company which have been paid with his money. He at least obtains a verdict and a judgment to the extent of the £25,000. He was forced to bring the action, and he has obtained a substantial sum in that action. I think under these circumstances Lord *Wenlock's* representatives would be entitled to the general costs of the trial, and with regard to any costs incurred in this future inquiry they must be reserved to be dealt with according to the result. If any further costs were incurred at the trial by reason of further claims than those which we have upheld, then those costs ought to be costs in favour of the Defendants, and deducted from the costs which will be payable to Lord *Wenlock's* representatives. With regard to the costs of the appeal, which was brought for the purpose of obtaining an absolute reversal of the judgment, I think it was contended almost to the end that it ought to be an absolute reversal, even as to the £25,000; and if that be so, each party

1872, the Inclosure Commissioners charged the inheritance of an estate in the county of *Flint* belonging to the *River Dee Company*

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has succeeded on the appeal as to a substantial part, and we think there ought to be no costs of the appeal.

COTTON, L.J. :—

This is an action on covenant to recover a very large sum of money, and I am of opinion that the Plaintiffs are entitled to recover £25,000 and interest, on the ground that the Act of 1851 gives the company power to raise money to that extent on mortgage or bond, and to raise it with interest. The objection taken was that in a later Act by sect. 7 it was provided that all the future borrowing (and this was after the Act of 1868, which contained the clause I am referring to) should be upon mortgage, and not upon bond, and that it was said prevented the company from borrowing even on a mortgage which contained a covenant on which they could be sued as giving a personal remedy against them; but in my opinion that contention ought not to prevail; in fact it was almost given up, but as it was raised at one time I think it better to give my reason why I think it should not prevail. In the Act of 1851, whether the money was borrowed on mortgage or on bond, there was a provision enabling the company to be sued in an action of debt for recovery of the money when the time arrived for payment, and that being so, it is not a substantial objection; and although it is rather difficult to see why that provision was put into the Act of 1868, yet in my opinion it would be wrong to hold that in consequence of that not being followed, if it has not been followed, a person lending his money honestly to the company should be deprived of his remedy. In my opinion a mortgage, unless it is said that it shall not be so, does include what is naturally in a mortgage, a covenant. Perhaps the Legislature thought it right, in order to simplify matters, that a mortgage should be the only form in which they should give security, and on that ground to do away with the bond; but as they did not take away the power given by the previous Act to sue the company on an action of debt for the recovery of the money, whether the form of the security was mortgage or bond, in my opinion we ought not to give this section of the later Act the effect of depriving the person of the right of suing which is always given by a mortgage. But then the Plaintiffs contended that the company could borrow very much beyond the £25,000, and that must, in my opinion, turn on the construction of the Act. Before I deal with that, I will deal with one argument which was much pressed here, namely, that this borrowing had been assented to by all the shareholders in the corporation, and that therefore it must be binding on the corporation which is borrowing. In my opinion there is this obvious fallacy. The majority of shareholders in general meeting can direct, and are the proper mode of directing in certain cases, how the powers of the corporation are to be exercised, and if there is no meeting which is the regular method of directing how the powers can be exercised where the power is not given to the directors; and the shareholders can assent to that which is proposed; the Court would never allow it to be said that there was an absence of resolution when all the shareholders, and not only a majority, (being part of the lands mortgaged to Lord *Wenlock*) with the payment to the *Lands Improvement Company* of twenty-five yearly

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have expressly assented to that which is being done. That, however, must be confined to cases where the act done is within the powers of the corporation. All the shareholders and all the stockholders are entirely different from the corporation, and although the want of a formal resolution, which might be required for the exercise of the powers so as to bind the minority, would be done away with, in my opinion the assent of all the shareholders cannot make valid as against the corporation that which under the Act of incorporation the corporation has not the power to do.

Now is there such a power in the Act of incorporation? There is clearly no express power to borrow. I think one ought to look to the objects for which the corporation is incorporated and see whether from implication there is any power given to the corporation for the purpose of borrowing money, and one also ought to look to see whether the Act of incorporation is such that one can infer from it that it was intended to give to the creature of the statute power to borrow, which power no doubt an individual has if anybody will lend to him. But the question whether the creature of a statute has that power must depend on what is the fair construction of the Act of Parliament incorporating it, and on what are there intended, so far as we can see, to be the powers which the corporation shall by express or implied enactment have. I quite agree with Mr. *Rigby* that there is a very great difference when one is considering whether the act is within the objects of the corporation, or is a power incident to the objects for which the corporation is formed. You do find expressly what are to be the objects of the corporation and the purpose it is to carry out. You may look, and you must look at the instrument and the general nature of the purposes to see whether the corporation has such powers as may be required or may be useful in carrying out those purposes and objects. Here it is said that this is a power incident to the nature of this corporation. In my opinion it is not. What is it that this corporation is formed for? Is it formed to take up an undertaking begun by private individuals? It has powers for the purpose of doing that. The object of the parties was to make a navigable channel in the river *Dee* and to reclaim and make productive to the company as formed by the undertakers the land saved from the estuary on each side of the channel. Then we come to the Act. First of all it was said it must have this power because *Nathaniel Kinderley* and his associates had it, and that this Act vests in the corporation all that which *Nathaniel Kinderley* might have done, or was empowered to do by virtue of the Act of the sixth year of his then present Majesty. It does not enable the corporation to do everything that *Nathaniel Kinderley* could have done, but it only vests in the corporation those powers of executing the works which are by the Act given to *Nathaniel Kinderley*. That gets rid of that point.

Then, independently of that, what is the corporation? It is a corporation with certain definite joint stock, which is mentioned in the Act, for the purpose of carrying out the work which was begun by *Nathaniel Kinderley* and his associates. Now it is not quite certain whether the corporation sums of £429 7*s.* 4*d.*, being a proportionate repayment of the capital sum of £6405, with interest at £4 10*s.* per cent.

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could sell the lands which were reclaimed from the sea, but that I think it is unnecessary to give any opinion upon. They could buy some lands, and they certainly bought lands, and they could certainly make them productive for the purpose of their undertaking, or for their own benefit in any way they thought fit, and take all such profit as they could get from the reclaimed land without selling it. That being so, it is impossible to assume, as Mr. *Rigby* asked us to do, that the £52,000, which in the Act of 14 Geo. 2 was stated to be the joint stock, would be insufficient to carry out the objects for which the corporation was formed. As I look upon the Act it was considered that that, together with the profit which they might get from time to time from the reclaimed lands, was what they represented to Parliament as sufficient to enable them to carry out the work, and it was to carry out the work with such profit as they might get that they were incorporated. If so, that, in my opinion, negatives any implication that this corporation was to have in addition to the joint stock, and in addition to the profit they might get from selling any land they bought, an additional power of borrowing to any extent they thought fit either by mortgage or by bond. In my opinion, therefore, this is not a corporation which from its Acts has any implied power of borrowing money. In my opinion, on the true construction and effect of the Act of incorporation of 14 Geo. 2, it was a corporation which was not to have such a power, and was to deal with the undertaking by means of that which was pointed out as its joint stock and as to such profits as might accrue to it. That being so, certainly the later Acts on this point cannot in any way help the Plaintiffs. I do not think it necessary to refer to them, because I think it better to deal with the case on what I think is the true construction of the Act of incorporation of 14 Geo. 2.

Therefore, in my opinion, a borrowing power is not necessary as a prior incident to carrying out this enterprise for which the corporation was formed, and the true interpretation of the statute being that they were not to have any power of borrowing, the conclusion at which I have arrived at is that they had no power of borrowing beyond and except such power as was given them by the Acts of 1851 and 1868. That being so, in the action on the covenant the Plaintiffs have failed beyond £25,000 and interest, both of which are authorized to be contracted for by the Act of 1851.

But at the trial liberty was given to the Plaintiffs to amend, and we should have given it to them here, to raise a now well-established equity, that even although the corporation had no power of borrowing money so as to bind itself irrespective of the purposes for which the money is applied, yet if it appears that the money lent was in fact applied in payment of debts properly contracted by the corporation, then the party lending the money is entitled to stand as if he were the assignee of the creditors who were paid off, and he is entitled to stand in their place, and is entitled to have an inquiry whether any of the money advanced by him without statutory authority on the part of the corporation to borrow it was applied in paying off any debts and liabilities on which

On the 28th of April, 1873, the sum of £6501, being the amount of yearly instalments payable to the *Lands Improvement*

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the corporation could have been sued, and for which it was liable. There is a *primâ facie* case made out that such was the fact, and therefore the Plaintiffs are entitled to an inquiry whether any of the sums in excess of the £25,000 advanced by the *Rock* and by Lord *Wenlock*, or either of them, was applied in payment of debts or liabilities of the company properly payable by it. That is all we are called upon to decide in this case.

But it was suggested by Mr. *Rigby* that there are other equities, in fact he tried to establish them in this action; but I think it would not have been right for us to allow that matter to be entered into here because the Plaintiffs had gone throughout on an entirely different foundation. They had gone originally simply on their legal right at the hearing, and the only equity that they raised was that equity which I have just said they are entitled to the benefit of. But these new equities I do not in any way encourage or give any opinion upon. They open an entirely new field. The action here was on the ground that money had been lent to the company, and was to be repaid by it. Not being entitled to recover against the company, the new equity, as I understand it, is, that they are entitled in some way to follow the shares, either as against the corporation or against the shareholders who were parties to the original transaction towards Lord *Wenlock*. I think the proper thing to do, and I think that Mr. *Rigby* saw that that would give him the most benefit, will be in making this decree to say that it shall be without prejudice to any proceedings which the Plaintiffs may be advised to take to enforce any equities they may have with respect to following the shares, which we have not adjudicated upon.

BOWEN, L.J.:—

I am of the same opinion.

I understand that our judgment is given in the first place upon the point raised by Mr. *Davey*, as to the construction of the statute, and I am of opinion with the remainder of the Court that the *River Dee Company* had no power to enter into the contract upon which they were sued. Beyond that, we decide by our judgment that the Plaintiffs are entitled to the equitable doctrine set forth in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.*, and we further reserve them all rights they may have, if any, to any equities they may establish outside that. The only matter upon which I propose to add any words is the question of law relating to the construction of the statute and the suggested power of the *River Dee Company* to enter into the contracts sued upon. The contracts sued upon are covenants for the repayment of the money purported to be secured by mortgage of the company's lands. The company was incorporated by the Act of 14 Geo. 2, and the sole question—at least I think the sole question—is whether under that Act the corporation was clothed with the power of borrowing money and binding itself to repay the money; or if it was so clothed, whether such powers have been taken away by the later Acts.

Now, Mr. *Rigby* has presented for our consideration this sort of canon of construction of the statute. He said that when there is a statute which

Company, was paid to them out of the £85,000 advanced by Lord *Wenlock;* and by an instrument under the seal of the *Lands*

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incorporates a company, you ought if you want to know whether the company can borrow money, to approach the statute assuming that the company can borrow money, unless the power is taken away expressly or by implication. I confess that I do not think that that is the true canon of construction, though I admit that far greater men have appeared to think it was. Of course one can only go by the light of one's own reason, and I propose to consider these statutes from a slightly different point of view, although I do not think my view makes very much difference. I wish, however, to explain the way in which I travel towards the consideration of them.

At common law a corporation created by the King's charter has, *primâ facie*, and has been known to have ever since *Sutton's Hospital Case* (10 Rep. 13), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute takes it away is, I think, to travel on a wrong line of thought. What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had. There are

Improvement Company, and dated on the 28th of April, 1873, the absolute order charging the lands was discharged and put an end

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two questions, first whether a statutory corporation can borrow, and, secondly, whether if it cannot, its professed acts of borrowing can be ratified by consent of all the members of the corporation. Now, assuming that it is not a creature created with borrowing power, it is obvious that no amount of ratification by the individual members can make good an act which cannot be done; and therefore the same legal result is arrived at, if you consider the case from that point of view, as if you said that the shareholders were attempting to do an act which was prohibited. The real truth is, they are trying to ratify what cannot be ratified, because they are trying to ratify an act which the corporation is not in any view clothed with capacity to do. I therefore approach this case with a desire to find out what is this creature. Was it meant to borrow or was it not meant to borrow?

Before I go to the statutes I should like to add that it seems to me that the right test of construction, at all events with regard to this contract of Lord *Wenlock's*, is laid down by the Lord Chancellor in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* (22 Ch.D. 70). He says: "There is also no doubt, that where there is not an express prohibition against borrowing in the case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes." That seems to me to be putting into a nutshell and into very clear language exactly the test which would follow the course of thought I have been pursuing, and that it is the test which we must apply here. Applying it (I am not going through the history of the company or through the history of the statutes again), I agree with what the Master of the Rolls and Lord Justice *Cotton* have said. I find in the first place that lands have been vested in this company and in its assigns. White-sands and large tracts of land were to become theirs, and they were to have the profits which they could make by farming these lands for their use and purposes. The company were to make good certain liabilities in which the Act involved them as respects neighbouring proprietors, and as respects the navigation of the *River Dee*, and a body of Commissioners was created with power of entering upon the lands for the purpose of enforcing the due fulfilment by the company of those obligations; and lastly, in the Act of incorporation there was a provision by which the company was to be prevented, or rather its shareholders were to be prevented, from parting with any of their shares until the river was made navigable. The second Act followed a few years afterwards, no doubt after a certain portion of work had been done by the company, and the second Act and the first Act together shew that for the purpose of financing the adventure the corporation had conferred upon them the following sources of profit. In the first place they had their own capital, and in the second place they had reclaimed lands which they could utilise and lease and farm. I agree with Lord Justice *Cotton* in what he has said as to entertaining considerable doubt whether the company could sell any of those *River Dee* lands except a certain portion which is to. The order itself was given up to the *River Dee Company* with receipts indorsed.

The executors of Lord *Wenlock*, before the referee, claimed

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specified in schedule 3 of the Act of 14 Geo. 2. If that is the true view (I do not think it is necessary actually to decide the question) it would lead me to suppose that if they could not sell them they could not mortgage them, but they could not at all events sell the great body of the reclaimed lands. They had power of selling a portion, and they had power of making a further call, and there was no express power of borrowing given. Now I admit that it is not very clear by express enactment, and it is not very clear on the construction of these Acts that the company had not got implicit power of borrowing for purposes which were necessary and proper for carrying on their business. I do not mean to say that it is absolutely clear that they had not got a general borrowing power, but I think that if it stood simply upon these first two Acts I should come to the conclusion that they had not got a general borrowing power, or, at all events, any power of borrowing beyond what was actually necessary for carrying on their business. If the present loan is certainly not a loan which it was necessary for the company to take for the purpose of carrying on their business, then, unless they had a general borrowing power they cannot pray in aid any limited borrowing power that they had by implication on the construction of the first Act. I confess that my judgment, if it stood on the Acts alone, would be that if they had not such power it was not any way to be seen within the ambit of these Acts that the Legislature intended them to become a borrowing body. They have other means of providing themselves with funds, and I think that this becomes clearer from the later Acts, and that those later Acts are valuable for the purposes of the construction of the earlier Acts. When you have ambiguous Acts of Parliament it is an established maxim of construction that you can go to the use which has been made under the Acts of Parliament which you are interpreting by persons who are bound to obey them, with the view of finding out on which side the balance ought to descend. Now, we have with regard to these earlier Acts of Parliament this; in the first place, as far as we can learn there has never been a single attempt made under them to exercise any borrowing power; that is significant. Secondly, we have in the later Act a recital by the body itself, to my mind a recital amounting to this, that they had not got it. To my mind they say so not very clearly, but nevertheless they do say so in the preamble of the earlier Act. They say so in express terms in the later Act, and then you find that with those recitals they have obtained from Parliament a limited power of borrowing. Now I do not say that if they had previously a common law power of contracting, this limited power of borrowing on mortgage which was contained in the later Acts would take it away, but I do say that the action of the Legislature in 1851, put in motion as the Legislature was by the *River Dee Company* itself, and the declarations contained in the preamble to the Act itself, which are in fact propositions put forward for the consideration of Parliament by the *River* the benefit of the charge created by the absolute order, and now brought this action to establish their claim.

Rigby, Q.C., and *Methold*, for the Plaintiffs:—

We concede that the *River Dee Company* had no power simply to borrow this money from the *Improvement Company*, and that the relation of debtor and creditor was never established, but the land is charged nevertheless and the Plaintiffs succeed to the charge. The money has been had and spent, and the land of the company is so far relieved, and it will be unjust if the man whose money was taken is not to have the benefit. This does not come within the mischief intended to be provided against by the restriction in the Act. Curiously enough there is nothing to prevent the company from incurring debts. In *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* (1) it was held that the bankers could follow the securities and recover the money advanced by them. Whether the lender knew what was to be done with his money does not affect his right. The property has been improved with Lord *Wenlock's* money, and the company wish to have and keep the benefit without paying for it. Even if the charge was extinguished the Plaintiffs can have the benefit of it, and it must be presumed to have been kept alive. In fact the *Improvement Company's* Act provides no means for extinguishing a charge once created, though it can be assigned. Perhaps if the company had paid off the principal with its own money there would be an equity to have the charge assigned but not extinguished. The *River Dee Company* could not have forced the *Improvement Company* to take the money. As to the pleading that this charge was altogether illegal and void, the object of the *Improvement Company's* Act was that the land, to whomever it belonged, should be charged, even if it belonged to an ecclesiastical corporation, with certain precautions. Glebe may be charged, and yet there are the strongest restrictions on the alienation of

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Dee Company itself, do throw a conclusive light upon the earlier statutes and compel me to arrive without any real doubt at the conclusion that on the true construction the *River Dee Company* down to the Act of *Victoria* was not a corporation which had a general power of borrowing.

(1) 29 Ch. D. 902.

glebe. The original Act gives the names of the seven persons who were to form the company, and the principles of modern company Acts ought not to be applied to a company of a different nature. *In re Knatchbull's Settled Estate* (1) was on a very similar Act. The Building Society cases turned upon the question who had a right to call for the legal estate: *Pease* v. *Jackson* (2); but that does not arise here: *Scottish Widows' Fund* v. *Craig* (3). The Court of Appeal in this case (4) says in effect "follow your money whenever you can."

Sir *H. Davey*, Q.C., *Barber*, Q.C., and *Kirby*, for the *River Dee Company*:—

There are three questions: 1. Whether a valid security was created; 2. Whether the Plaintiffs are entitled to the benefit of any such security; and 3. Whether the debt is not barred by the *Statute of Limitations*. No doubt the *Improvement Company's* Act enables a rector or vicar or tenant for life to charge the land, but that has nothing to do with his capacity to borrow. There is nothing in that company's Acts which removes a statutory prohibition from borrowing. If the landowner is not a borrowing creature he cannot avail himself of their powers to charge. A rector or vicar or tenant for life has power to borrow and charge the land, but only to the extent of his own interest, and not on the fee simple.

[KEKEWICH, J.:—Could a railway company having exhausted its borrowing powers go to the *Lands Improvement Company* and charge the money lent on a warehouse built for the improvement of the railway?]

This is a loan, though probably there is no liability enforceable by law against the borrower or his estate. The 32nd section and the other sections of the Act merely prescribe the machinery under which a limited owner may obtain money, and give no power of creating a charge. If there is no power of borrowing the mere adoption of the machinery of the Act cannot give power though it might cause a defect in the title.

(1) 29 Ch. D. 588.
(2) Law Rep. 3 Ch. 576.
(3) 20 Ch. D. 208.
(4) 19 Q. B. D. 155.

[KEKEWICH, J., referred to *Taylor* v. *Taylor* (1).]

Even if the charge was good Lord *Wenlock* cannot derive any benefit from it under the doctrine of subrogation.

Hornell, for the *Lands Improvement Company*.

Methold, in reply :—

The statutory prohibition of alienating the lands of ecclesiastical corporations has existed from 13 Eliz. c. 20, but no doubt the money advanced to a rector or vicar can be charged on the glebe. The Act is expressly intended to enable persons to borrow who could not otherwise do so, and to charge the land to whomsoever it may belong and above all other claimants. The Act creates an absolute charge on the land, and it must exist for the benefit of any one who has paid off the charge. As to other corporations with limited powers of borrowing, such as railway companies, it is clear that money could not be advanced to them, as their purposes would not be those specified in the Act.

KEKEWICH, J. :—

This case raises some very interesting and important questions —interesting and important to the parties—and some, or at any rate one, of considerable public importance. I find myself relieved from the necessity of deciding many, because I think that I can properly decide this case on one only, which has been threshed out sufficiently for me to express a decided opinion upon it. Sir *Horace Davey* says that this absolute order on which the Plaintiffs' claim is founded—an absolute order in favour of the *Lands Improvement Company*—giving them, or some persons on their behalf—the distinction is immaterial—a charge on property of the *River Dee Company* is, notwithstanding all the formalities that have been observed, notwithstanding the seal affixed, not a charge on the property of the *River Dee Company*, because no such charge could properly have been created under the powers conferred by the *Lands Improvement Company's Act*. It is true that a landowner is defined in large terms according to the Act now in force as the person (which includes a corporation) who shall be in the actual possession or receipt of the rent and profits of any land. It is true that a "person" is expressly said to denote and include any body corporate, whether aggregate or sole, whether lay, ecclesiastical, or collegiate, as well as an individual. It is further true that a corporation sole, at any rate an ecclesiastical corporation, is, to some extent at least, under that disability, which has been pointed out by Mr. *Methold* as created by statute, of being unable to alienate the lands which are vested in him for the time being. But I take it that there is a large difference between any such corporation and a corporation such as we are dealing with here, called into existence by statute, the creature of statute for specific purposes, and armed with specific powers which must not be exceeded for the fulfilment of those particular purposes. Looking at the exercise of any alleged power on behalf of a corporation of that kind we must see whether it is either expressly given by the statute, or is necessarily implied in order to the fulfilment of its powers. If we cannot bring it within that—and a necessary implication in such a case differs not at all from expression—then the company cannot exercise the alleged power.

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(1) 1 Ch. D. 426; 3 Ch. D. 145.

We have here a company which is prohibited from borrowing more than a certain sum, as has been found after litigation; and it is the basis of this case, the common ground of both sides, that it has been so held. Lord *Blackburn* (1) expresses it tersely in this way: "I can hardly, after reading that enactment, and remembering what had been decided in *Chambers* v. *Manchester and Milford Railway Company* (2), doubt that the Legislature did there express an intention that the company should thenceforward have power to borrow £25,000, and no more." It is said that notwithstanding this the company borrowed some £6000 odd from the *Lands Improvement Company*. If the company did so it follows that it did the very thing which it was prohibited from doing, and did it by means of the Acts of the *Lands Improvement Company*. I think that in order to come to that conclusion I ought to find something in those Acts as express as the prohibition, and I do not find it. This is a corporation, but it would not be difficult to instance other corporations which would come within the same interpretation clause. Municipal corporations

(1) 10 App. Cas. 360.

(2) 5 B. & S. 588.

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have powers of borrowing for certain purposes, and many others might be mentioned, and in so saying I am not forgetting what Mr. *Methold* pointed out—that the purposes for which money can be borrowed under these Acts are clearly specified in sect. 3 of the Act of 1859, and that as to many of such corporations it might be difficult to conceive their undertaking the improvements mentioned in that particular section. But still the principle is applied to all, and it cannot be doubted that many of those corporations might reasonably require money for some of the purposes specified, and if this Act enables the *Lands Improvement Company* to advance money to such a corporation for those purposes it does the very thing which is expressly prohibited. I find no words here equivalent to the words of prohibition which have been already construed. But then I am told that by sect. 53 the absolute order is conclusive evidence both at law and in equity, "to all intents and purposes, of the contract to which such charge relates having been duly entered into by the proper parties, and of all acts and proceedings by this Act directed with reference to or consequent on such contract having been duly had and done, and of such charge having been duly made and executed." I feel no difficulty in saying that that is mere procedure, and only obviates the necessity of any person who takes an assignment of this charge or advances money on it looking into the matter to see whether the contract has been entered into in proper form, and whether the Commissioners have made those inquiries which they were bound to make as to the value of the land and the nature and desirability of the improvement suggested. The clause goes on to say: "and being a valid charge under this Act on the inheritance of the lands appearing to be subject thereto." That seems to carry it a little further, but I think that the answer to any argument on those words is that as a matter of fact, or perhaps it would be more correct to say as a matter of law, there cannot be under the particular circumstances a valid charge, and therefore the order cannot be conclusive evidence of that which in law has no existence. That seems to me to be the right construction of the clause.

I referred in the course of the argument to an analogous case as to conclusive evidence, the only case which occurred to me,

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and no other has been mentioned by counsel. The case occurred under an Act which was repealed by the Act of 1862—the *Companies Act*, 1857. There the certificate of the registration of the incorporation of a company is ordered by statute to be conclusive evidence of the registration. But when the *Northumberland and Durham District Banking Company* (1), which was a company formed under earlier statutes, and which it was desired to wind up, was registered for the purposes of winding-up, the objection was taken that the incorporation was bad because it was not a company within the statute, and that was argued before the Court of Appeal. Lord Justice *Turner* (2) said this: "I may here notice an argument which was urged on the part of some of the Respondents, that we have nothing to do with the question whether this company was authorized to be registered or not; that it was sufficient that the company was in fact registered, and that the certificate of registration is, by the 115th section of the *Joint Stock Companies Act*, 1856, rendered conclusive. I notice this argument only for the purpose of laying it entirely out of the case. If this company was not authorized to be registered, I take it to be quite clear that the certificate of registration can be of no avail." That seems to me to be in *pari materia*. If as a matter of law there could not have been a proper charge, the absolute order, though conclusive on many other points, would not be conclusive evidence against the Act. That, to my mind, disposes of the case, on the ground that, whatever other rights the Plaintiffs may have, they have been subrogated to nothing—to a thing non-existent because the charge was invalid.

I therefore do not think it necessary to give any opinion on the other points, and I need not further discuss the delicate question of equity explained in the judgment of Lord *Selborne* in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (3), and in the judgment of Lord Justice *Fry* in this case (4).

I think it right to add this. In my opinion, the charge in favour of the *Lands Improvement Company*, if it ever had a valid existence, was extinguished by the receipt which was indorsed on the absolute order. I read that as meaning an absolute discharge of the £6405, being the amount of principal money secured. A similar receipt, or a receipt, was given for the interest, and so the whole charge was put an end to. I have not gone fully into the question depending on that, not wishing to decide it; but it occurs to me that this would not prevent the Plaintiffs from being entitled to the benefit of that charge if as a matter of fact the charge ever existed in law, and if it otherwise comes within the decisions which have been referred to. It seems to me that the right of the Plaintiffs would be not to the actual charge but to the benefit of the charge and that they would not be deprived of such right as those decisions gave them by the mere fact that the charge was extinguished in law.

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(1) 2 De G. & J. 357.

(2) Ibid. 371.

(3) 22 Ch. D. 61.

(4) 19 Q. B. D. 155, 159.

I do not think it necessary to say anything about the *Statute of Limitations,* though I have not forgotten that point. I am against the Plaintiffs on the first ground, that no valid charge was ever created on the lands of the *River Dee Company* under the Acts of the *Lands Improvement Company.* Therefore, on that ground I give judgment for both Defendants with the costs of the action.

Solicitors for Plaintiffs: *Emmett, Son & Stubbs.*

Solicitors for the *River Dee Company: Ashurst, Morris, & Co.*

Solicitors for the *Lands Improvement Company: West, King, & Co.*

C. M.

FOSTER *v.* WHEELER.

[1886 F. 1120.]

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1887

July 26, 27; Aug. 12.

Specific Performance—Damages—Agreement to enter into Agreement—Married Woman—Separate Estate.

An agreement was made between *W.* and *F.* that *W.* would enter into an agreement with *O.* for a lease at a certain rent for such term and subject to such covenants as *O.* should approve, and would accept such lease and execute a counterpart:—

Held, that *F.* was entitled to recover damages from *W.* for breach of the agreement between them.

W. *L. FOSTER*, the Plaintiff, held a house at *Clapham* called *Cedar Lodge* under Dr. *G. B. Ord* for the residue of a term of years.

On the 9th of April, 1886, an agreement was made between *W. L. Foster* and Miss *B. I. Wheeler,* the Defendant, containing the following terms: "1. Within seven days from the date hereof Miss *Wheeler* is to enter into a binding agreement with Dr. *G. B. Ord*, the lessor of *Cedar Lodge, Queen's Road, Clapham Park*, for a lease from Dr. *Ord* of the said premises at a rental of £140 per annum for such a term (to commence from the 24th day of June next) and subject to such covenants as Dr. *Ord* shall approve; and Miss *Wheeler* shall accept and take up such lease when ready and execute a counterpart thereof."

There were other terms not material to the case as reported.

After much correspondence between the parties, Miss *Wheeler* refused to go on with the matter, and Mr. *Foster* brought this action, alleging that he had at the request of the Defendant moved out of the house, and that Dr. *Ord* was willing to approve of a lease to the Defendant; and claiming specific performance or damages.

Barber, Q.C., and *Yate Lee*, for the Plaintiff:—

The Plaintiff has suffered wrong, and is clearly entitled to damages, though specific performance cannot be given.

Warmington, Q.C., and *Job Bradford*, for the Defendant:—

There is nothing here definite and enforceable: *Pearce* v. *Watts* (1). An agreement to make an agreement cannot be enforced. One person cannot maintain an action against another to compel an agreement with a third person, and in the absence of the third person.

Barber, in reply.

1887. Aug. 12. Kekewich, J.:—

In this case I am asked to enforce a contract of a peculiar character.

In April, 1886, the Defendant wished to rent and occupy a house then in possession of the Plaintiff, as tenant under a Dr. *Ord*. There is some inaccuracy in the written agreement touching the reference to this gentleman, but he is sufficiently identified with the lessor of the house, and the inaccuracy is not material. The Plaintiff was willing that the Defendant should have the house, and was prepared to facilitate her taking his place. The Defendant had reason to believe that Dr. *Ord* would accept her as tenant and grant her such a lease as she required, and the Plaintiff stipulated that she should procure this to be done.

These facts sufficiently appear from the correspondence (which, whether strictly admissible in evidence or not, was read without objection), but apart from the correspondence may fairly be inferred from the written agreement of the 9th of April, 1886, which has given rise to the litigation. The point for decision arises on the first paragraph of that agreement, which is in the following terms:—[His Lordship read the paragraph.]

It is not expressed in a form usually adopted by lawyers, and some discussion might have been avoided if it had been expressed differently; but I think that when examined in connection with the rest of the agreement it is sufficiently plain. Some of the other clauses specify what is to be done by the Plaintiff, or by both Plaintiff and Defendant, but this clause is restricted to what is to be done by the Defendant alone without the Plaintiff's intervention, and she thereby binds herself, first, to enter into an agreement with Dr. *Ord* for a lease at a certain rent, but otherwise according to his own conditions, and secondly to accept such a lease, and if need be execute a counterpart. It may be that if Dr. *Ord* had declined to enter into any agreement at all, or had imposed conditions of an unreasonable character, the Defendant might have pleaded this as an excuse for non-performance of the agreement, but that question does not arise, and I will not enter into it. Nor is there any question whether the time, "seven days," within which the Defendant bound herself to enter into an agreement is of the essence of the contract; for the complaint against her is not that she did not fulfil her obligation within seven days, but that she has not fulfilled it at all; that is after the lapse of a considerable time, and after every opportunity of fulfilling it has been given to her.

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(1) Law Rep. 20 Eq. 492.

The defence is, that such an agreement as this cannot be enforced. This defence rests I think on a confusion, not by any means uncommon, between enforcing a contract and ordering a contract to be specifically performed. A decree (to use the old Chancery term) for specific performance was and is one method of enforcing a contract, but it was not and is not the only method. A contract might equally, though often not so effectually, be enforced by a judgment for damages. There are many contracts which were and are enforceable in one way but not in the other, and until recent times the jurisdiction of the Court of Chancery was limited to the more effectual remedy and failed when that could not be applied. I assent to the proposition on behalf of the Defendant that an agreement (such as occurs here) to enter into an agreement cannot be ordered to be specifically performed, on the ground that before the Court can properly make a decree of that character it must be satisfied that the parties have contracted to do something of a definite character, something ascertained, or which can be readily ascertained, and something, too, which can be done by simple methods within the control of the Court, and which the Court can supervise and, if need be, aid.

But the proposition of the Defendant goes beyond this. It is insisted broadly that an agreement to enter into an agreement is not a contract recognised by law, that is, is not enforceable. An agreement between two persons, *A.* and *B.*, that one of them will either immediately, or at some future time, or subject to the performance of some condition, enter into an agreement with the other is I think not enforceable, because it does not fall within the meaning of the term "contract" as defined by law. Definitions of "contract" are to be found in the text-books, and I have consulted several of them, including an American one, that of Mr. *Parsons.* They are all founded on, and many of them simply adopt, the definition given by *Pothier* in part I., ch. 1, sec. 1, of his work on Contracts. This is his definition, which I take from the English translation of Mr. *W. D. Evans* (1): "An agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other to give some particular thing, or to do or abstain from doing some particular act." Mr. *Pollock's* definition in his work on the same subject (2) slightly differs from this, and is, in my opinion, more complete and more accurate. He defines a contract, or rather an agreement, to be "an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them;" and in commenting on this definition he explains what is intended by an act in the law, saying that it must be on the face of the matter capable of having legal effect and concerned with duties and rights which can be dealt with by a Court of Justice. Accepting this definition, I think that such a promise or engagement as I have above suggested does not fall within it, for I do not see how a Court of Justice can deal with a matter so uncertain, or how, in other words, legal effect can be given to a promise or engagement as an agreement when the parties have not yet themselves determined what the agreement is to be.

These remarks would not necessarily be applicable to a promise or engagement to sign a particular document, or even to a promise or engagement to sign a document to be prepared by a

(1) Vol. i., p. 4.

(2) 3rd Ed., p. 3.

certain person or on defined lines. They are not, I think, at all applicable to a promise or engagement by one of two parties to enter into an agreement of a character ascertained or capable of being ascertained with a third, and I see nothing in a promise or engagement of that character to prevent its being a contract capable on its face of having legal effect and concerned with duties and rights which can be dealt with by a Court of Justice. The breach therefore by the Defendant of the contract into which she entered with the Plaintiff by the first clause of the agreement of the 9th of April, 1886, constitutes a cause of action.

It is not asked that the Defendant shall be ordered specifically to perform the contract. If she had in fact entered into a binding agreement with Dr. *Ord*, he might of course demand specific performance of that agreement, and as at present advised I think that the Plaintiff might require the Defendant to accept a lease pursuant to such agreement under the contract of April, 1886, in the presence of or possibly even without the presence of Dr. *Ord* as a party to the action. But it is common ground that no concluded agreement has been entered into with Dr. *Ord*; and the action is necessarily rested on that basis. It follows that the Plaintiff's remedy is in damages only, and his case was opened in that manner.

I must hold the Defendant to blame for failing to enter into an agreement with Dr. *Ord*. Two difficulties arose in the course of the negotiations; one about an allowance of £200 for repairs, the other about the expense of obtaining the consent of the ground landlord. As regards each of these difficulties the Defendant has had conceded to her all that she insisted on, and the Plaintiff has met her liberally. She nevertheless, and notwithstanding that practically everything was at length settled, declines to perform her contract. It is not for me to discuss her motives or to consider whether her conduct has been perfect or otherwise. Suffice it to say that after expressing some doubt whether she would continue what was styled the arrangement or negotiations, she ultimately determined to have no more to do with the matter. This she was entitled to do at the risk of being held liable in a Court of Justice, and I hold her liable.

The admitted facts of the case point to the conclusion that the Plaintiff has sustained appreciable damage by endeavouring to fulfil his part of the agreement when the Defendant has not fulfilled hers. But I have no means of assessing the amount, and I can only direct an inquiry.

Solicitors for Plaintiff: *Wansey, Bowen & Co.*
Solicitors for Defendant: *Wild, Browne, & Wild.*

C. M.

C. A.
1887
Feb. 2.

In re LITTLE'S WILL.
In re HARRISON.

[1887 L. 39.]

Married Woman—Restraint on Anticipation—Conveyancing and Law of Property Act, 1881, *s.* 39.

Order enabling a married woman to mortgage a life interest as to which she was restrained from anticipation made without requiring the trustees to be served.

ELIZABETH HARRISON was entitled under the will of *W. B. Little* to certain life interests in property vested in the trustees of the will, with a restraint on anticipation. She and her husband were in difficulties, and she took out an originating summons under the *Conveyancing and Law of Property Act,* 1881, sect. 39, for leave to bind her life interest for the purpose of raising a sum not exceeding £300, and to charge her life interest with that sum and interest and the premiums on a life policy for £350. The husband only was served.

Mr. Justice *Kay* on the 25th of January, 1887, gave Mrs. *Harrison* leave only to charge her interest, with £110 and interest. Mrs. *Harrison* appealed.

Whately, for the appeal.

[COTTON, L.J.:—Why were not the trustees served?]

It has been usual to serve them, but I submit that it is in a case like this unnecessary. It would cause a considerable amount of additional expense, which in so small a matter it is important to avoid. It would involve furnishing copies of summons, affidavits, and exhibits, and numerous attendances by them before the Chief Clerk and the Judge. The Act does not direct service on the trustees, the order sought for does not in any way deal with the fund, and there does not appear to be any purpose to be answered by serving the trustees.

THE COURT (*Cotton, Lindley,* and *Lopes,* L.JJ.), without giving any formal judgment on the point, proceeded with the appeal in

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the absence of the trustees, and came to the conclusion that it would be for Mrs. *Harrison's* benefit to allow her to raise £300 by mortgage of her life interest and a policy of assurance. Their Lordships accordingly made an order giving her liberty to charge her life interest with that sum and interest, and with the premiums on a policy of assurance for £350 on her life. The £300 was ordered to be paid to Mrs. *Harrison's* solicitors, they undertaking to pay thereout the costs of the application, and of the mortgage, then to pay the first year's premium on the policy, and to apply the balance in payment of certain scheduled debts if and so far as it was sufficient for that purpose, and to pay the balance (if any) to Mrs. *Harrison* for her separate use.

Solicitors: *Mear & Fowler.*

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In re BARANGAH OIL REFINING COMPANY.

ARNOT'S CASE.

Company — Companies Act, 1867 (30 *&* 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628]—*Paid-up Shares—Registration of Contract—Specific Performance.*

As between the company and *A.*, the duty of registering under the *Companies Act*, 1867, s. 25, an agreement that a sum of cash voted to *A.*, shall be given to and accepted by him in fully paid-up shares is not specially thrown upon *A.*, but falls upon the party seeking to enforce performance of the contract.

Subject to confirmation by a meeting of shareholders it was agreed by directors of a company to give, and by *A.* to accept, fully paid-up shares in satisfaction of his admitted claim against the company for services rendered. At the shareholders' meeting it was subsequently resolved "that a sum of £—— be voted to *A.*, which he agreed to take in fully paid-up shares." The agreement was not registered under the *Companies Act*, 1867, s. 25, and there was no sufficient evidence that there had been any distinctive allotment or acceptance of shares pursuant to the agreement.

On application by the liquidator to place *A.* on the list of contributories as holder of unpaid shares to the extent agreed to be given:—

Held, that there had been nothing amounting to a payment in cash for the shares by *A.*; but that as the only contract between the company and *A.* was that fully paid-up shares should be given and accepted, a contract to take unpaid shares could not, in the absence of evidence of any assent on the part of *A.* to vary the original contract, be enforced against *A.* by the liquidator on behalf of the company; and accordingly that *A.* was not liable as a contributory for the number of shares mentioned in the agreement.

Blyth's Case (1) considered and distinguished.

APPEAL from a decision of Mr. Justice *North*, placing Captain *Arnot*, formerly a director of the *Barangah Oil Refining Company*, now in liquidation, on the list of contributories in respect of 240 and 75 shares of the nominal value of £5 per share.

Captain *Arnot* was elected a director of the company in April, 1879, when resident at *Rangoon*, where he held an official position.

He came to *England* in 1881, and attended a board meeting on the 29th of June in that year.

In November, 1881, Captain *Arnot* was requested to make a journey to *Burma*, for the purpose of looking after the affairs of the company, and on the 6th of January, 1882, he left *England* for *Burma*, returning in April of that year. For his expenses of this journey he received the sum of £500.

In November, 1882, he made a second journey to *India* at the request of the directors, and returned in May, 1883, in respect of which journey he received a sum of £683.

At a meeting of the board of directors, held on the 13th of June, 1883, at which he was present, it was resolved "That 500 fully paid-up shares in the company be voted and presented to Captain *Arnot* in recognition of his services on behalf of the company in undertaking two journeys to *India*, subject to confirmation at the next general meeting of the shareholders." At another meeting of the board on the 30th of August, 1883, it was resolved "With reference to the minute of the 19th of June, 1883 (the vote of 500 shares), that the board further vote Captain *Arnot* seventy-five fully paid-up shares, subject to confirmation of the shareholders at the next general meeting, for the additional assistance he has rendered the company." The next general meeting of the company after the directors' meetings of June and August was held on the 24th of October, 1883, and it was then resolved by the shareholders "That a sum of

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£2875 be voted to Captain *Arnot*, which he agreed to take in 575 fully paid-up shares." Captain *Arnot* was present at this meeting and assented to the resolution.

The books of the company were in a very irregular state, and no proper share register was kept.

With respect to the 500 shares there was no formal allotment, but there was an entry in the shareholders' ledger to the account of Captain *Arnot*, under date the 27th of June, 1883, with distinctive numbers assigned to them. No certificates of these shares were issued, but ten certificates, each representing fifty shares, were made out and bore date the 27th of June, 1883. The certificates bore the signatures of *Plum*, the secretary, and of Captain *Arnot* as one of the directors. The certificates were not delivered to Captain *Arnot*, and had been torn out of the certificate book, but were found fastened to the counterfoils.

The resolutions being conditional upon subsequent confirmation, no contract was registered pursuant to the *Companies Act*, 1867, s. 25, in respect of the 500 or of the 75 shares. In the case of the 75 shares no certificates were made out, and no distinctive numbers were allotted to the shares. No allotment was made in accordance with the resolution of the shareholders' meeting on the 24th of October, 1883, and the books did not contain any entries made at the time for carrying this resolution into effect. It appeared, however, that the auditors in writing up the books at the beginning of 1884, made an entry under date the 31st of December, 1883, debiting capital expenditure with £2875, "for 575 fully paid-up shares voted to Captain *Arnot*, as per board minute, June 13, 1883, August 30, 1883, and October 24, 1883," and Captain *Arnot's* account with £2875 special remuneration.

It appeared also that in November, 1883, Captain *Arnot* had transferred 60 shares, and in March, 1884, 200 shares from the 500 shares to which distinctive numbers had been assigned in the ledger. Captain *Arnot* stated however, that he did not know that he was dealing with the 500 shares, but that he intended to transfer shares which had been allotted to him before the transactions of 1883, and for which he had paid in cash, and that he had handed the transfers when signed to the secretary, Mr. *Plum*, for the numbers to be filled in.

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In the proceedings under the winding-up of the company the liquidator had placed Captain *Arnot's* name on the list of contributories as the holder of 315 £5 shares (balance of the 575 shares) in respect of which nothing had been paid, on the ground that they had been paid for otherwise than by cash under contracts not registered in accordance with sect. 25 of the *Companies Act*, 1867.

Mr. Justice *North*, on an application by Captain *Arnot* to have his name removed from the list of contributories, held on the 4th of November, 1886, that Captain *Arnot* had agreed to take the 575 shares, and that he must be placed on the list of contributories in respect of the 315 which remained standing in his name, and that, no contract for the issue of the shares as fully paid up having been registered in compliance with sect. 25 of the *Companies Act*, 1867, the shares must be treated as having had nothing paid in respect of them, and the £2875 which was voted to Captain *Arnot* could not be treated as an independent debt and set off against the corresponding sum which was due from him upon the shares, so as to make the shares fully paid up. Captain *Arnot* appealed from this decision, and on the hearing of the appeal the Court allowed fresh evidence to be adduced by the examination of Captain *Arnot*, Mr. *Plum*, the former secretary of the company, and some clerks. In the result this new evidence satisfied the Court that when Captain *Arnot* executed the transfers of the 60 and 200 shares in November, 1883, and March, 1884, the numbers of the shares were not filled in, and that until informed by the liquidator that the shares included in these transfers were part of the 575 shares he believed that he had been transferring some other shares which had been previously allotted to and paid for by him, and the certificates of which he had placed in the custody of Mr. *Plum*; that the numbers were wrongly filled in by the mistake of *Barr*, a clerk of the company; that when Captain *Arnot* signed the certificates he did so only with the intention of taking the shares when they should be duly allotted to him as in fact fully paid up in compliance with sect. 25; that Captain *Arnot's* name was entered in the company's books under date the 27th of June, 1883, as the holder of the shares without his knowledge or assent; that there had been no variation of the agreement that the shares to be allotted to him were to be fully paid up, and that he never assented to be treated as owner or intended to deal with the shares on any other footing.

Buckley, Q.C., and *Stewart-Smith*, in support of the appeal relied upon *Spargo's Case* (1); *Clarke's Case* (2).

Maclean, Q.C., and *Swinfen Eady*, for the Respondent, the liquidator, cited *Blyth's Case* (3); *White's Case* (4); *Andress' Case* (5).

COTTON, L.J.:—

The only question is whether Captain *Arnot* is to be relieved in respect of the 240 and 75 shares, the balance which remains, after a transfer executed by him of 260 shares, of the 575 shares which were dealt with by the resolution passed at a general meeting in October, 1883. One point which was urged on the part of the Appellant was that assuming these shares ought to be treated as properly standing in his name, they should be considered as paid for in cash, because they were to be taken in lieu of £2875 which was voted to him. Undoubtedly, if independently of this resolution, there had been a dealing by the company with Captain *Arnot*, entitling him to receive from them a sum of money equal to the value of the shares, then, in accordance with the cases, and in accordance with principle, that might be considered as amounting in effect to a payment in cash, so as to get rid of any further liability in respect of the shares if the liability existed. In my opinion it would be wrong to apply that principle to a case where the only transaction which is claimed to amount to a payment in cash is an agreement to be paid in shares, which is embodied in the same resolution as that which allots him the sum in respect of which he is to take the shares. That would really be to allow shares to be allotted as paid-up shares, without any registration, in compliance with the requirements of sect. 25 of the *Companies Act*, 1867, of the contract

(1) Law Rep. 8 Ch. 407.
(2) 8 Ch. D. 635.
(3) 4 Ch. D. 140.
(4) 12 Ch. D. 511.
(5) 8 Ch. D. 126.

under which they were to be treated as being paid up. That, however, does not decide the case as there are other questions which arise for consideration. As a matter of fact no contract was registered as regards these shares. It has been said on behalf of the liquidator that these shares are to be considered as shares in respect of which there was no registration, and accordingly that Captain *Arnot*, under sect. 23 of the *Companies Act*, 1862, must be considered as a contributory, because that section points out those who are to be considered as members. [His Lordship referred to the section, and proceeded :—] All members of the company in point of law are to be considered as contributories. I do not enter into the question whether the very irregularly kept book called the shareholders' ledger is to be considered as a register of shareholders. To enable it to be said that under sect. 23, any one has agreed to become a member, and therefore is a contributory, it must be shewn either that, with his own assent and with his own knowledge, his name has been entered as the holder of the shares, in respect of which it is sought to fix him as a contributory, upon something which may be considered as a register of the shareholders or members of the company ; or it must be shewn that a contract was entered into by him with the company which ought to be specifically performed, so that the Court would be justified, without the assent of the alleged contributory, in putting him upon the register in respect of shares which, it is said, he contracted to take from the company. Is there then any contract of which the liquidator could successfully claim specific performance, and in respect of which he could ask the Court to amend the register by placing upon it the name of the alleged contributory in respect of these shares? With respect to the contract it was perfectly understood that what Captain *Arnot* agreed to was to take the £2875 in fully paid-up shares. These shares, having regard to sect. 25 of the *Companies Act*, 1867, are not shares which in the eye of the law could be considered as paid up, but are shares in respect of which any one taking them must be held liable for the whole amount. It was contended on behalf of the liquidator, that as between the company and Captain *Arnot* only, but not as against the liquidator, the shares were considered as paid-up shares; but in my opinion that is not a correct view. What the contract requires is that the shares should be considered as paid up, that is shares in respect of which no call could be made upon the holder. Although these were shares in the company, there is, in my opinion, a material difference between shares in respect of which there is no liability, and shares in respect of which there is liability to the full amount. In the one case the proposed shareholder is to have the benefit of the shares for a consideration, and in the other he is to be treated in the same way as any other shareholder. This is not a contract subject to the same considerations as any other contract with the company, but it is a contract between Captain *Arnot* and the company that he shall accept and that they shall give that which is in point of fact to be considered as paid-up shares. It is said that the company have done their part, and that it was intended that when Captain *Arnot* agreed to take these shares as paid-up shares, it was to be by registering the contract under which they were to be issued as paid up. In my opinion sect. 25 of the Act of 1867 does not throw upon any particular party to the contract the obligation of registering the contract under which the shares are to be issued, or require that the contract is to be registered before the shares can be considered as paid-up shares. It is for those who seek to enforce a contract to take shares, to put themselves in a position to be able to complete their contract, that is to say, it is for the company effectually to perform that part of the contract which is necessary in order to make these shares fully paid-up shares. It is true that Lord Justice *James* in *Blyth's Case* (1) did say that as between the company and the allottee (from whom *Blyth* purchased) the shares were at the time fully paid-up shares within the meaning of the articles, but as the contract was not registered, *Blyth* was liable as the holder of unpaid shares. I am not certain that he was not there referring to the particular constitution of that company, by the articles of which "all shares allotted or issued as the consideration for the purchase of any property were to be considered as fully paid up;" and the contract there was simply to grant and take those shares. It may be said here that the contract was for particular shares, and that it provided, though ineffectually, that they should be shares fully paid up. In *Blyth's Case* (1) the contracting party who contemplated taking the shares had taken them, and allowed them to be put in his name upon the register, and when upon the register with his knowledge, he had dealt with them by transferring them to *Blyth*, who was placed on the list of contributories, and who contended that he was under no liability in respect of the shares. In my opinion that case has no bearing upon what has to be here decided, and I only refer to it because reference has been made to the observation of Lord Justice *James*, the effect of which I have stated. If there is no obligation on Captain *Arnot* to register the contract in order to make the shares paid up, the contract must be registered before he can be made to take the shares, and that has not been done. In my opinion if we must consider this case as one of specific performance, it would be useless to ask the Court to compel a man specifically to perform a contract from which, if specifically performed, he would get no benefit, but only a liability which, on the face of the contract, it appears he was not to incur.

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As a matter of contract and as a matter of law the company never were in a position to say that they had been always ready and willing to perform their part of the contract by offering or giving to Captain *Arnot* that which he intended to take, viz., fully paid-up shares in this company. That, in my opinion, disposes of the first part of this argument, but of course if there was a contract—assuming that he had undertaken to take these shares—he would be compelled to take them, and that would have enabled the liquidator to put him upon the list of contributories in respect of them. But then comes the question, which depends upon the evidence: Did Captain *Arnot* ever agree or assent to take or have these shares in his name? A contract was entered into that he would take shares, but the shares which he agreed to take were to be fully paid-up shares, and, these being the shares which he had agreed to take, that he would allow them to be put in his name. Although there was not a conditional contract yet he assumed that they were shares which were offered by the company in pursuance of the contract which he had entered into with the company. The question is did he accept those shares, although if he stood on his rights he might have refused them, and have said you have not given me the shares which I contracted to take; and you can only put me on the register for those shares for which I contracted, and I am not liable for those which you have allotted to me.

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(1) 4 Ch. D. 140.

The case upon the books as unexplained was strong against Captain *Arnot*, but when we have heard the additional evidence allowed to be given here [to which his Lordship referred] there is not in my opinion any sufficient evidence to justify me in saying that the shares were treated by him as his, or that this company dealt with any of these shares as his. And although we may take it that he was willing to take and intended to take the 575 shares still the company had not put themselves in a position to give him those shares as paid-up shares.

I will only mention one other matter. It was contended that sect. 25 of the Act of 1867 only applies in winding-up cases. That is not so. Whether there would be a remedy against the company in respect of the contract it is not necessary to consider; the company never offered these shares or tried to compel Captain *Arnot* to take them before the winding-up, and in my opinion he never did hold them, that is to say, take them as shares. He is therefore entitled in my opinion to be relieved from these 240 and 75 shares.

Then comes the question of costs. We did not think that the affidavit of Captain *Arnot* was sufficient to explain the matter, or that it gave us sufficient materials. We therefore adjourned this matter so that he could be called to give further evidence. He has been cross-examined, and further evidence has been gone into which has enabled us to ascertain the facts of the case, and we have come to the conclusion that Captain *Arnot* ought to be relieved. Now the liquidator took upon himself without due investigation to try to put him upon the list in respect of these 240 and 75 shares; the proper course therefore will be that Captain *Arnot* should have the costs in the Court below, and as the appeal has been decided upon fresh grounds and fresh evidence which we thought ought to be adduced so as to enable us to do justice between the parties, there will be no order as to the costs of this appeal.

BOWEN, L.J.:—

I am of the same opinion. I may say that the decision come to by the learned Judge in the Court below was really on evidence different from that adduced to this Court. Is then the liquidator entitled to say that Captain *Arnot* ought to be upon the register in respect of the 240 and 75 shares? The Respondent, the liquidator, in the first place maintains that there was an agreement to take fully paid-up shares, and that the company have done all they were bound to do in order to justify them in asking for a decision that Captain *Arnot* held or agreed to hold those shares. Now the answer to that is clear, viz., that what was agreed was that Captain *Arnot* should receive from the company, and the company should give to Captain *Arnot*, paid-up shares, and that they have not given him paid-up shares, that is, legally paid-up shares, which in law are bound to be shares such as are mentioned in sect. 25 of the Act of 1867. But to my mind these shares have not been dealt with and are not paid-up shares. Accordingly, the company in giving Captain *Arnot* shares which are not paid up are not fulfilling their contract. It is like the case of a merchant who has undertaken to supply cotton saying that he fulfils his contract by supplying bark. Then it was said that this was a conditional contract to take shares which were not to be paid up until Captain *Arnot* did something, and that the fact of this not being done entitled the company to say that they were not bound to go further, and to give him the shares completely paid up. The answer to that is that sect. 25 of the *Companies Act*, 1867, does not throw upon one party more than the other the necessity of completing the title as regards paid-up shares. The true view of the facts, as has been pointed out by the Lord Justice, is that the matter was left in an inchoate form, that neither side did take the necessary steps to complete that which was the contract, namely, to give fully paid-up shares. Therefore, on that ground, the company cannot be entitled to specific performance.

We have to inquire next whether anything was done by Captain

Arnot to assent to these specific shares being treated by the company as if they were appropriated to himself. The books and documents of the company would shew that sufficient was done, unless there be some explanation given. These books and documents are, I think, *primâ facie* evidence against Captain *Arnot*, and if there were nothing else to explain them then the Act of 1867 would be against him; but I think the fallacy of the liquidator's position is that the books are only *primâ facie* evidence, and that the real question is whether Captain *Arnot* has indeed accepted the shares. It never was understood by the officers of the company that he had. The notion that a director of a company who has put himself apparently in the position of taking shares is conclusively bound, is one which cannot be maintained either at law or in equity, although the books are no doubt *primâ facie* evidence against him. However, in this case we have had the opportunity of having Captain *Arnot* in the box and Mr. *Plum* the secretary of the company. I see no reason at all for not giving full credence to the evidence of both those gentlemen. I do not think that either of those gentlemen knew from first to last that these shares were entered in any of the company's books as issued, or believed that they had been in fact issued to Captain *Arnot*. I mean that the secretary did not know it any more than Captain *Arnot*, and that if there was anything in the books or anything in the company's possession which looked as if the shares had been held and dealt with as being issued, that was a mistake which was known neither to Captain *Arnot* nor to the company. Captain *Arnot* really did not know what the documents contained, and therefore cannot be said to have assented to any statement which was made in them. However, there is some evidence on the other side, namely, the evidence of the boy *Barr*, but it seems to me that if we believe Captain *Arnot* and Mr. *Plum*, the whole of the rest of the case disappears upon the hypothesis —which is a possible one—that the entire difficulty is due to the boy *Barr*. This young gentleman seems to have been turned loose on the books of the company during his leisure hours in order to improve his business habits, and if upon the evidence of Captain *Arnot* and the secretary, and of the boy *Barr*, it is asked which of them I believe, I say that I believe Captain *Arnot* and the secretary. I do not wish to say anything further than that about the evidence of *Barr*, but I do not think he has given such evidence before us as we can be expected to rely upon. One more argument which has been used is that Captain *Arnot's* case down to the present time, or rather, down to the hearing of this appeal, was not that he was not bound by what appeared by the books of the company which related to these shares as issued, but that he had in fact paid for them in cash. The true state of circumstances was that the company voted him money, and when the company voted the money it was as equivalent to shares. That was Captain *Arnot*'s case down to the hearing of this appeal, and it was his case in the Court below, and the Court below considered his defence a bad defence. No doubt the true inference to be drawn from what was put forward in that defence was that he intended always to take the shares—that he intended to have them—and I think that Captain *Arnot* himself in the box admitted he was intending to have them. The truth of the matter is, that by a piece of good fortune, although Captain *Arnot* intended to get them sooner or later, and it was the intention of the secretary that he should have them, nothing was actually done in respect of appropriating to him those shares either by the secretary or anyone else, and therefore he escaped in that way. I therefore think the order which Lord Justice *Cotton* has suggested is the right one.

FRY, L.J.:—

I am of the same mind. The question for decision turns largely upon sect. 25 of the Act of 1867. That section provides, as we all know, "that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar at or before the issue of such shares."

No such agreement has been reduced into writing or filed with the Registrar. Two points have been raised upon this section. It was contended by the Appellant that an actual payment in cash had been made, and it was said that the agreement to take shares, which was coupled with the agreement to give Captain *Arnot* £2875, was equivalent to a payment in cash. In my opinion no such argument can prevail. I think it plain that a mere agreement to give money contemporaneous with an agreement to take shares—cannot be a payment in cash. Therefore, so far, I agree with the Respondents. Then arises this inquiry, whether the shares in question were held by Captain *Arnot?* I put the question in that way because we have been pressed in argument that the conclusion at which we now arrive will infringe upon and lessen the operation of sect. 25. But that section only applies to shares which have been issued and held and therefore the inquiry is whether Captain *Arnot* did hold these shares? That question I conceive to be the same as whether he was a member of the company or ought to be made a member of the company in respect of these shares, and that turns upon the 23rd section of the Act of 1862. Leaving out of consideration the question of registration and whether or not there was a payment in cash: Did Captain *Arnot* agree to become a member of the company in respect of these shares? To answer that question I look in the first place to the original agreement between Captain *Arnot* and the company, and I find that it was an agreement to take a sum of money in a certain number of shares, which are described as fully paid-up shares. It is plain that was not a bargain to take shares of any other description, and that cannot be held to be an agreement to take shares which are not paid up. So much for the original bargain. Then arises this inquiry, which to my mind has been throughout the most difficult and important. Has that original bargain been varied by the action, or deeds, or words of Captain *Arnot* so as to substitute for it a bargain to take shares which were not fully paid up, he relying upon some future proceeding to make them fully paid-up shares? There was a very considerable body of evidence I think to shew that Captain *Arnot* had so agreed to vary the original agreement. Certificates, all signed by himself, which had been removed from the certificate book; a transfer executed of certain of these shares as if they belonged to him; and entries in the books of the company that there had been a dealing with these shares not fully paid up as if they belonged to him. I state there was a strong body of *primâ facie* evidence to support the conclusion that he had agreed to the variation of the bargain. The matter appearing unsatisfactory, we have had the great benefit of hearing the witnesses; and having heard the witnesses, their evidence has shewn to my mind clearly that there was no assent whatever on the part of Captain *Arnot* to depart from the original bargain. I think that the certificates were signed, not because he had taken the shares, but because he expected to have them, and that he expected that when these shares were allotted to him they would be allotted to him as fully paid-up shares, and that there was not any expressed intention to deal with these shares in any other way. So with regard to the transfers, I am satisfied upon his evidence and that of Mr. *Plum* that he was not cognisant that these transfers were filled up with the numbers of the shares that were allotted to him under the agreement in question. Lastly, with regard to the entries in the book, I have come to the same conclusion as Lords Justices *Cotton* and *Bowen*—Captain *Arnot* has satisfied my mind that those entries were not made with his knowledge, or with his privity, and that they cannot be held in any way to affect him. I may say, upon the evidence, that I take the same view of it as Lord Justice *Bowen*, and where there is a conflict of evidence between that of *Barr* and of Captain *Arnot* and Mr. *Plum*, I prefer to take the evidence of Captain *Arnot* and Mr. *Plum*; but I do not desire to impute to *Barr* that he gave his evidence with any improper intention. Although, then the books shew a strong *primâ facie* case against the Appellant, that has been removed by the evidence, and there is nothing whatever to shew that either by the original or any subsequent agreement Captain *Arnot* ever agreed to become a member of the company in respect of the shares which it is sought to fix him with. The result, therefore, is that the appeal succeeds.

Solicitors: *Rooks & Co.; Milton Bradford.*

F. G. A. W.

C. A.
1887
June 17;
July 5, 8.

BANKES v. SMALL.

[1886. B. 37.]

Estate Tail—Enlargement of Base Fee—Covenant for further Assurance—Specific Performance of Agreement by Tenant in Tail—Fines and Recoveries Act (3 & 4 *Will.* 4, c. 74), ss. 19, 47 [*Revised Ed. Statutes, vol. vii., pp.* 494, 500].

A tenant in tail in remainder barred his estate tail without the consent of the protector, and afterwards conveyed all his estate and interest to a purchaser, and covenanted that he would, at the request of the purchaser, his heirs or assigns, execute every such disentailing or other assurance as might be necessary to vest the premises in the purchaser, his heirs and assigns. The protector having died, the purchaser applied to the vendor to execute a disentailing deed to enlarge the base fee into a fee simple:—

Held (affirming the decision of *Kekewich*, J.), that the vendor was bound to execute such a deed, for that his covenant was not confined to executing assurances to remedy any defects in the title to the base fee, but obliged him to execute an assurance to enlarge the base fee into a fee simple, and that he had power to execute an assurance which would have that effect, for that the 19th section of the *Fines and Recoveries Act* is not confined to cases where the tenant in tail is owner of the base fee into which his estate tail has been converted:—

Held, also, by the Court of Appeal, that the 47th section of the Act does not interfere with the jurisdiction of the Court to decree against a tenant in tail specific performance of a contract for disentailment entered into by him, but only prevents the Court from treating the contract as being in equity a disposition taking effect under the Act so as to bind the issue in tail and remainderman.

UNDER the will of *W. Small* a certain farm stood limited to *Martin Small* for life with remainder to his first and other sons successively in tail male. There were two sons, *Martin Lambert Small* and *W. P. R. Small*. In October, 1871, *Martin L. Small* barred his estate tail without the consent of the protector, and afterwards mortgaged his interest to *Green*. In 1874 *M. Small* and *M. L. Small* agreed to sell the farm to *Bankes*, and a conveyance was prepared, but *M. Small* refused to execute it. On the 30th of March, 1875, a deed was executed by which it was recited that *M. L. Small* and *W. P. R. Small* had agreed with *Bankes* to sell him all their estates and interests in the farm for £2200, and *Green*, *M. L. Small*, and *W. P. R. Small* according to their estates and interests granted the farm to *Bankes* in fee. *M. L. Small* and *W. P. R. Small* by the same deed covenanted that they had power to grant the "estates, interests, and premises thereby granted" unto and to the use of *Bankes*, his heirs and assigns, in manner aforesaid, and further, that they "and every person having or claiming any estate, right, title, or interest in or to the said premises or any of them through or in trust for them or either of them will at all times, at the costs of the said *W. R. Bankes*, his heirs or assigns, execute every such disentailing and other assurance, and do every such thing for the further or more perfectly assuring all or any of the said premises to the use of the said *W. R. Bankes*, his heirs or assigns, as by the said *W. R. Bankes*, his heirs or assigns, shall be reasonably required."

The tenant for life died in 1884, and *Bankes* then requested *M. L. Small* to execute a disentailing deed to enlarge the base fee into a fee simple. *M. L. Small* refused, and *Bankes* thereupon brought an action for specific performance of the covenant, which was decreed by Mr. Justice *Kekewich* (1).

The Defendant appealed.

June 17. *Russell Roberts*, for the Appellant:—

The vendors only agreed to sell such estates and interests as they could convey, and the covenant for further assurance was only a covenant to remedy any defects in the title to what was being conveyed, not a covenant to give a further estate. A covenant for further assurance is only a covenant to further and better assure what is conveyed by the deed, not to convey something which the deed does not convey. Such a covenant by a termor would not bind him to convey the fee if he acquired it. This is then only a covenant to further and better assure the base fee.

[FRY, L.J.:—How could a disentailing assurance be wanted for that purpose?]

There might be a slip in the enrolment, or a field or two might have been left out in the parcels. The construction of the covenant, I contend, is that the vendors shall remedy all defects in the title to the interests which they convey by the deed, and, if necessary, by a disentailing assurance. The whole scope of the deed is confined to the estates and interests of the vendor. The old contract to which *Martin Small* was a party was abandoned, and there was a new contract by which the vendors agreed to sell such estate as they could. "Premises" in this covenant must be read in the same sense as in the former part of the covenant, not as denoting the property, but the estates and interests in it which were conveyed by the deed.

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(1) 34 Ch. D. 415.

But supposing the Court against me on this, I contend that when a tenant in tail who creates a base fee has absolutely parted with it he cannot enlarge it into a fee simple. There is an express power in the Act to a person who has been tenant in tail and has converted it into a base fee, to enlarge his estate into a fee simple when there is no longer a protector; but this cannot apply to a person who has parted with his estate. He is not a tenant in tail within the meaning of that expression as defined by the interpretation clause. The enabling clause, sect. 15, does not apply, and the 19th section, as to enlarging a base fee, does not apply to a person who no longer has that base fee.

[The Court, at the conclusion of the Appellant's argument, said that they did not wish to hear counsel for the Respondent on either of the points which had been argued, but that they wished to hear them on the question, which had not been raised by the Defendant either in the Court below or on the appeal, whether the 47th section of the Act did not take away the jurisdiction of the Court to decree specific performance of the covenant.]

The appeal stood over that this point might be argued.

July 5. *Barber*, Q.C., and *Rawlinson*, for the Respondent:—

The Court is not asked to make an order giving any greater effect to the deed which has been executed than it had under the Act. It is only asked to make a personal order against the tenant in tail who executed the deed to enforce his performance of the covenant contained in it. The Courts of Equity had power before the passing of the *Fines and Recoveries Act* to enforce specific performance of an agreement to suffer a recovery:

Attorney-General v. *Day* (1); *Frank* v. *Mainwaring* (2). The *Fines and Recoveries Act* did not take away this power. The 47th section of that Act was intended to prevent imperfect assurances from being made effectual as disentailing deeds, not to take away the jurisdiction of the Court to enforce contracts by personal process against those who make them. This jurisdiction is recognised by the 14th section of the *Judicature Act*, 1884, 47 & 48 Vict. c. 61, which empowers the Court to nominate a person to execute any conveyance when the person who is ordered to execute it neglects or refuses. Although there is no decided case directly in point, this view of the construction of the 47th section of the *Fines and Recoveries Act* has been expressed by the most eminent text-writers, and is consistent with numerous cases: *Sugden's* Vendors and Purchasers (3); *Sugden's* Real Property Statutes (4); *Hayes* on Conveyancing (5); *Dart's* Vendors and Purchasers (6); *Davis* v. *Tollemache* (7); *Petre* v. *Duncombe* (8); *Lewis* v. *Duncombe* (9): *Dering* v. *Kynaston* (10); *Hilbers* v. *Parkinson* (11); *Hall-Dare* v. *Hall-Dare* (12); *Pryce* v. *Bury* (13).

Russell Roberts (*Warmington*, Q.C., with him), for the Appellant:—

It is admitted that there is no direct authority in favour of the construction of the 47th section contended for by the Respondent, and it is contrary to the general scope of the Act. The object of the Act was to prevent the Courts of Equity not only from interfering for the purpose of curing defects in the assurances, but from interfering to carry out in any way the incomplete intentions of the parties. This is shewn by the latter part of the 47th section, which would be ineffectual if the power of the Courts to enforce specific performance was reserved. It is true that before the Act was passed the Courts had the power of enforcing specific performance of an agreement to suffer a

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(1) 1 Ves. Sen. 218, 223.
(2) 2 Beav. 115, 126.
(3) 14th Ed. pp. 204, 469.
(4) 2nd Ed. p. 221.
(5) 5th Ed. vol. ii. p. 175.
(6) 4th Ed. p. 913; 5th Ed. p. 998.
(7) 2 Jur. (N.S.) 1181.
(8) 7 Hare, 24.
(9) 20 Beav. 398.
(10) Law Rep. 6 Eq. 210.
(11) 25 Ch. D. 200.
(12) 31 Ch. D. 251.
(13) 2 Drew. 11.

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recovery, and that power was recognised by 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, sub-s. 15 (repealed by 42 & 43 Vict. c. 59), which empowers the Court in certain cases to nominate a person to suffer a recovery in the place of a person refusing to do so. But the 14th section of the *Judicature Act*, 1884, referred to by the Respondent, makes no mention of disentailing assurances. If the Respondent's contention is correct the Court would have power to enforce performance of a contract by a protector to consent, which is plainly contrary to sects. 35 and 36.

Barber, in reply.

1887. July 8. COTTON, L.J.:—

This an appeal from a judgment of Mr. Justice *Kekewich* by which, under a covenant entered into by the Appellant, he directed him by way of specific performance of that covenant to execute a disentailing deed, so as to enlarge into a fee simple the base fee which was already vested in the Plaintiff.

The first point raised in the argument in favour of the appeal was that the covenant did not contain any contract by the Appellant to execute such a deed. The argument was very ingenious and very subtle, but I cannot, upon looking at the terms of the covenant, entertain any doubt upon the question. The argument as I understand it was this, that a covenant for further assurance is only a covenant to further and better assure such estate as is conveyed by the deed which contains the covenant. Whether that is so or not under ordinary circumstances may be a question, but here is an express contract to execute every such disentailing deed as may be necessary in order to vest the premises in *Bankes*, his heirs and assigns. "Premises" there must mean property conveyed, and in my opinion the terms of the covenant are so clear as to make it impossible to doubt that this is a contract to execute, when there is a power to do so, a disentailing deed so as effectually to vest the property in the purchaser, his heirs or assigns, which means for an estate in fee simple.

Then another point was raised by the ingenuity of counsel—that no disentailing deed could now be effectually executed by the Appellant. At the time when this purchase was made there was a protector of the settlement, who refused to join in a disentailing deed, and therefore a base fee only was conveyed to the purchaser, and this covenant was entered into. The Appellant now contends that as he had conveyed his base fee he was no longer to be considered a tenant in tail capable of executing a disentailing deed. In support of this his counsel relied on the interpretation clause (sect. 1) of the Act, and urged that, looking at the interpretation of "actual tenant in tail" and "tenant in tail" the Appellant could not be considered a tenant in tail so as to be capable of executing a disentailing assurance, though he would have been so if he had not conveyed away the estate as far as he then could. Now this Act provides that the expression "'tenant in tail' shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred." It was argued that this only applied where the base fee had not been parted with. But if we look at the Act it is clear that power is left to a person who has created a base fee and parted with it, to execute another assurance which will make effectual the conveyance to the purchaser who has only got all the vendor could then grant him, viz., a base fee. The 38th section provides that if a tenant in tail creates a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards, under the Act, make a disposition of the lands in which such voidable estate shall be created, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall have the effect of confirming such voidable estate. In my opinion this contention of the Appellant cannot prevail.

Those were the only two points argued on behalf of the Appellant, but there was another point suggested by the Court to Mr. *Barber* on which we desired to hear him. That was the question whether the effect of the 47th section was not to prevent specific performance of a covenant to execute a disentailing deed. In my opinion that is not its true construction. Before proceeding to construe that section we must consider what, at the time of the passing of the Act, was the law with respect to specific perform-

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ance as regards the then mode of barring estates tail. Where a person had entered into a contract for value to bar his estate tail, a Court of Equity would decree specific performance against him, and direct him to execute such assurance as would effectually bar the estate tail, *i.e.*, to levy a fine, or, if the case was one which required a common recovery, then to suffer a common recovery. But if he died without having done so, then, as against his issue in tail or the succeeding remainderman, a Court of Equity would not interfere at all, that is to say it would not give effect to a contract to suffer a recovery as if a recovery had been suffered, it would not treat what had been agreed to be done as having been done. I need not do more than refer to the case of *Attorney-General* v. *Day* (1), where it was held by Lord *Hardwicke* that although a Court of Equity would grant specific performance as against a tenant in tail who had entered into a contract to bar the estate tail, yet it would not do so as against the issue in tail, for they take by a title paramount *per formam doni*.

There is another point also which has to be considered. The Courts of Equity, where there was either valuable or meritorious consideration, gave effect to imperfect executions of powers, and did so, not only as against the person who had actually executed the instrument which was intended to be but was not a due execution of the power, but also as against those persons whom he could by a proper exercise of the power have defeated. That perhaps was not founded on sound principles, but it was undoubtedly done.

Bearing these points in mind we come to the consideration of sect. 47, "In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of Courts of Equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution, either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlements, and the supplying under any

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(1) 1 Ves. Sen. 218.

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circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a Court of law would not be an effectual disposition or consent under this Act." Now looking at what I have stated to be the law, and looking at the mere construction of this clause, its object in my opinion was to prevent a Court of Equity from holding that a contract to execute a disentailing assurance was, as against the issue in tail and remaindermen, as effectual in equity as if a disentailing deed had in fact been executed, and from remedying, according to the principles applicable to defective executions of powers, any defects in the execution of a deed intended to bar an estate tail. Let us look at the language of the section. The introductory words: "In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof," shew that the section only applies where there has been an attempt by a tenant in tail to dispose of land under the Act. It does not deal with the case of a mere contract to execute a disposition under the Act, but deals only with a deed intended to be operative under the Act, but which from some defect is not so operative. Then it says that the jurisdiction of Courts of Equity is to be "excluded either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlements." It is true that we have here a reference to the exclusion of the jurisdiction of a Court of Equity in regard to the specific performance of contracts, but it is only in cases of "dispositions of land under this Act by tenants in tail thereof," and if Mr. Justice *Kekewich* had held that the deed already executed was to be treated in equity as a good deed to bar the estate tail and remainders over under the Act, he would have gone against the 47th section. But he has not done so. He has not said that in equity this deed is to be considered as barring the estate tail;

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but he has said: "Here is a contract by the tenant in tail that when he has the power to do so he will effectually vest the property in the purchaser in fee, and that contract he is bound to perform." I do not give any opinion as to how far the Court could enforce specific performance of a contract by a protector of a settlement. If he contracted by deed probably that would be such a consent as is required by the Act; but I give no opinion whether the Court has power to enforce specific performance of a mere contract not under seal by a protector of a settlement, for we have only to deal here with a contract by the tenant in tail. Then the section goes on "and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively." That points particularly to supplying or getting rid of any defects in an instrument which has been executed as a disposition of lands under this Act. Then there comes words which cause a little difficulty "and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a Court of Law would not be an effectual disposition or consent under this Act." It was urged that by specifically performing this contract we were giving effect to the attempted disposition of the tenant in tail. But that is not so. We are not remedying any defect in that disposition, nor giving effect to it when by the Act it is not effectual at law. We are requiring the tenant in tail in specific performance of his contract to execute a good deed barring the estate tail and remainders over, which he, being tenant in tail in possession, is now able to do. In my opinion on the mere construction of that section, having regard to the law that existed before the Act both with regard to contracts to suffer recoveries and with regard to giving effect to defective executions of powers, the section does not take away the jurisdiction of a Court of Equity to compel a tenant in tail to do what he has agreed to do. There is no express decision on this point, but views have been expressed by the Courts, and also by counsel of great eminence, which are in accordance with the views I have expressed, and even if there were more doubt on the true construction of the section I think it would be wrong for us in a case which concerns the title to real estate to give an opinion contrary to the views so expressed. The first I refer to is the view of Lord *St. Leonards* in his book on the Real Property Statutes in 1852. He says (1): "It cannot be too strongly impressed upon purchasers, that their title will depend upon the legal validity of the dispositions under the statute," that is the *Fines and Recoveries Act*, "nothing can be supplied," no defect can be made good so as to make the attempted deed effectual. "If the instrument, for example, be not a deed, or being a deed is not enrolled in the proper Court in due time, it will be absolutely void, and equity cannot set it up. And although equity, notwithstanding the stringent clauses in the Act, will still be able to compel a seller to make a new valid conveyance, yet that could not be enforced against the issue, nor could it be enforced against a protector. No purchaser can be deemed safe unless the deeds are properly enrolled, and he should not part with his money until that is done." Mr. *Hayes* (*Hayes* on Conveyancing (2)), expresses himself to the same effect, so again does Lord *St. Leonards* in his book on Vendors and Purchasers (3), and Mr. *Dart* (*Dart's* Vendors and Purchasers (4)), expresses the same opinion, though not so fully or pointedly.

Then as regards cases, although the question has never been expressly decided, there was a case of *Lewis* v. *Duncombe* (5) where, in favour of a judgment creditor who under the statute had the same rights as if there had been a contract by the judgment debtor to charge the land, the Master of the Rolls ordered the defendant to execute a proper disentailing deed. Counsel, indeed, did not appear for the judgment debtor, but Lord *Selborne* was counsel for the plaintiff, and there were several other counsel of distinction in the case, and there does not seem to have been any doubt expressed about the jurisdiction. Then in *Dering* v. *Kynaston* (6), where the question was whether a contract to settle could be enforced as against a wife she having acquired an estate tail in property, Mr. *Southgate*, the counsel for the lady or those claiming under her, and whose object it was to contend there could be no specific performance, did not in any way

(1) Page 226.
(2) 5th Ed. vol. ii. pp. 163, 193.
(3) 14th Ed. pp. 204, 469.
(4) 5th Ed. p. 998.
(5) 20 Beav. 398.
(6) Law Rep. 6 Eq. 210, 212.

suggest that the Court could not enforce specific performance of a contract to bar an estate tail or to convey by an effectual disposition under the Act property vested in the contracting party for an estate tail. His only contention was that this covenant did not apply to the property in question. What he says is this: "The *Fines and Recoveries Abolition Act*, sect. 47, prevents the operation in equity of any disposition by a tenant in tail not made according to the Act; and though the Court would enforce specific performance of an express agreement to execute a disentailing deed, it will not, under a general covenant to settle property, or a covenant for further assurance, not expressly referring to a disentailing deed, compel the covenantor to defeat the estate of his issue or those in remainder," and for that purpose he refers to *Davis* v. *Tollemache* (1). The Master of the Rolls uses the expression that if the estate tail had become vested during the coverture he should have taken time to consider the other question, but I think that in saying this he was referring to the question what was the proper construction of the covenant in that case. There is therefore a *consensus* of opinion of Judges in the view that they could enforce a contract to disentail, and even counsel of Mr. *Southgate's* power and eminence did not contend that the section would prevent the Court from granting a decree for specific performance against the contracting party.

In my opinion this point, though it is well it has been fully discussed, cannot assist the Appellant, and the appeal must be dismissed.

FRY, L.J.:—

At the request of Lord Justice *Bowen* I proceed to deliver the next judgment.

With regard to the construction of the covenant in question I have very little to add to what has been said by Lord Justice *Cotton*. It appears to me that the recitals contained in the deed are strong to shew that the covenant was intended to enable the purchaser to require the vendor to execute a disentailing assurance and to convey to him the fee simple of the land. From those recitals it appears that there had been a negotiation for the purchase of the fee simple, that that broke down in consequence of the tenant for life, the protector of the settlement, refusing his consent, and that then the persons entitled in remainder in effect agreed to sell the fee simple, subject to the life estate of the tenant for life, and to make out a complete title on the death of the tenant for life. I think that the language of the covenant itself really excludes all doubt. It stipulates that a disentailing assurance shall be executed if required, and a disentailing assurance could not be required for the purpose of confirming the base fee.

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(1) 2 Jur. (N.S.) 1181.

The second point argued before us was this: It was said that a tenant in tail who has converted his estate tail into a base fee in favour of a purchaser cannot enlarge that base fee into a fee simple. I have no doubt of his power so to do, and, as it appears to me, the 35th section is conclusive upon the point. The 34th section having provided for the consent of the protector of the settlement, the 35th section enacts "That where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred to exercise, as to the lands in respect of which there shall be such protector, the power of disposition hereinbefore contained." That is an express recognition of the power of the person who has converted his estate tail into a base fee to enlarge that into an estate in fee simple with the assent of the protector.

Then comes the third point, which was one raised by ourselves, and which is to my mind the most difficult question we have to consider in this case. The question turns on the true construction to be given to the 47th section of the statute for the *Abolition of Fines and Recoveries.*

What was the state of the law as to the jurisdiction of equity at the time of the passing of the Act? That appears to me to be the first inquiry to which I ought to address myself. In the first place, it is clear that the Court of Chancery did entertain jurisdiction in the specific performance of contracts, whether under seal or not under seal, entered into by a tenant in tail to convey the estate in fee simple—that it would compel him by the usual process of contempt to levy a fine or suffer a recovery. That the jurisdiction of specific performance was exercised is plain among other things from the case of *Attorney-General* v. *Day* (1), to which Mr. *Barber* referred, and from the enactment contained in the 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, sub-s. 15, to which we were referred by Mr. *Russell Roberts*. Of the existence of that jurisdiction in specific performance there can be no doubt. But on the other hand the Court of Chancery appears to me (and here I speak with some little doubt, because it is not very easy to discover the ancient learning on fines and recoveries) to have exercised no jurisdiction with regard to the fine or the recovery itself. That is to say, it appears to me that the Court never spelt out of the fine or the recovery a contract to do anything more than had been already done in the Court of Common Pleas, that it never raised any contract from the proceedings in that Court, that it certainly supplied no defects in execution or want of execution of any instrument required for the purposes of the feigned litigation in the Court of Common Pleas, and, as far as I can gather, it exercised no jurisdiction of a corrective or beneficial kind over the proceedings in the fine or recovery itself. That I conceive to have been the natural result of the nature of those two assurances, because they were in point of form and conception proceedings in the Court of Common Pleas, and they ended in judgments of the Court of Common Pleas in feigned actions to recover the land; and naturally one Court would not interfere with the proceedings of another Court. This is illustrated by the circumstance that the power of rectification and amendment of fines and recoveries existed in, and was very largely exercised by, the Court in which those fines were levied or those recoveries were suffered. Again, it may be observed, as throwing some light on the inquiry, that so unwilling were the Courts of equity to assume any jurisdiction in respect of estates tail, that they required the formalities of a fine or recovery to be gone through in a Court of law in respect of equitable estates, although those fines and those recoveries

(1) 1 Ves. Sen. 218.

which were so gone through in the Court of law were void in law because they had no subject-matter on which to operate. It appears to me, therefore, to sum up these observations, that there was the jurisdiction in specific performance in cases of contract to suffer a recovery or levy a fine, but that there was no jurisdiction to aid in any manner the proceedings in the recoveries or fines themselves.

That being the state of the law I apply myself to the construction of the clause in question, and I find throughout these clauses an anxious desire to exclude to some extent the jurisdiction of equity. I will observe first that the 40th section, which gives a power of disposition by a tenant in tail, contains this provision, that no disposition by a tenant in tail shall be of any force either in law or in equity under this Act unless made or evidenced by deed, "and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this Act." This language appears to me to indicate an intention not to exclude jurisdiction in respect of contracts generally, not to interfere with the law or the equity relating to contracts, but only to provide that no disposition by a tenant in tail resting in contract shall have any force either at law or in equity under the Act. Then when we come to the 47th section we find that the jurisdiction of Courts of Equity is excluded in respect of four subject-matters of jurisdiction; first, in respect of specific performance of contracts; secondly, in respect of supplying defects in execution of powers; thirdly, in supplying want of execution of powers; and fourthly, in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector which in a Court of Law would not be an effectual consent or disposition under the Act. But the whole of the section is governed by the initial words—"In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof."

With regard to covenants by the protector I will follow the Lord Justice *Cotton's* reserve and express no opinion with regard to them. It may be the words of sect. 36 create a difference between that case and the case of contracts by tenants in tail. But it appears to me to be clear that if the Legislature had been minded to take away the jurisdiction of Courts of Equity to enforce contracts entered into by tenants in tail, that they would thereafter bar the estate tail, very different language from that which is used in this section would have been used. The section would not have been qualified by confining it to cases of dispositions under the Act by tenants in tail: because it is manifest to my mind that contracts (I take the case of express contracts) by tenant in tail that he will sell the fee, or that he will on the happening of a certain event execute a disentailing assurance, are not dispositions of land under the Act. They are not so in terms or in intention. They are contracts at common law, and not in any way dispositions under the Act, and make no pretence to having any operation under the Act.

I have come therefore to the conclusion that the true meaning of this section is to exclude all jurisdiction to treat as effectual in equity under the Act, either on the ground of specific performance, relief against defective execution or non-execution of powers, or on any other ground, an assurance intended to operate under the Act which is not effectual under the Act; but that it leaves the jurisdiction of the Courts with regard to enforcing contracts against the persons who have entered into them totally unaffected. To put the case very shortly, I say that the covenant under which the Plaintiff is suing is not a disposition of lands under the Act, and therefore that we may safely lay the ghost we have raised, and that we may also safely dismiss this appeal with the usual results.

BOWEN, L.J.:—

I have nothing to add.

Solicitors for Plaintiff: *Lovell, Son, & Pitfield,* agents for *Rawlins & Rawlins, Wimborne.*

Solicitor for Defendant: *R. Chapman.*

H. C. J.

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KEKEWICH, J.
June 28.
C. A.
July 27, 28, 29.

Inspection of Bankers' Books—Ex parte Order—Evidence—42 & 43 Vict. c. 11, s. 7.

An order giving liberty to inspect a banker's books and take copies of any entries therein for the purposes of legal proceedings, may be made under 42 & 43 Vict. c. 11, s. 7, on the application of a party to such proceedings *ex parte* and without evidence; though generally it is better that notice of the application should be served on the person whose account is to be inspected, and in some cases the Court may require evidence of the *bona fides* of the application, and of the materiality of the inspection.

Decision of *Kekewich*, J., affirmed.

THE case made by the statement of claim in this action, the Defendants to which were *Hayes* (proceedings against whom had been discontinued), the *Automatic Boiler Feeder, Limited*, *Webb* and *Beall*, was to the following effect:—That in January, February, April and May, 1885, the Defendant *Webb*, by and with the authority of the Defendant *Beall*, represented to the Plaintiff that the shares in the *Automatic Boiler Feeder, Limited* (other than those allotted to the vendor as paid up), had been subscribed for and allotted, and were selling at a premium, and suggested to the Plaintiff that he should purchase shares; that the Plaintiff, relying upon these representations, arranged with *Webb* to purchase at par 600 £1 shares fully paid up, from some person whose name did not transpire; that the Plaintiff accordingly bought the 600 shares and paid for them; that the vendor was in fact *Beall*, and that the purchase-money was received by or on account of *Beall*, who applied it to his own purposes; that the 600 shares were transferred to and registered in the name of the Plaintiff; that the representations made by *Webb* as above were untrue to the knowledge both of *Webb* and *Beall*, and that the shares were of no value; that the company never was a *bonâ fide* company, but was promoted and carried on by and for the benefit of *Beall*; that the signatories to the memorandum of association were creatures of *Beall*; that the directors were his nominees, and in his pay, and the broker of the company entirely dependent on him; that there were scarcely any *bonâ fide* shareholders of the company; that *Beall*, in order to give an appearance of *bona fides* to the company, had fraudulently placed many persons upon the register who had never applied for shares, and who had never paid, and were unable to pay, anything in respect thereof, and had never agreed to become shareholders; that the money that had been received in respect of shares had been wrongfully and fraudulently received by and converted to the use of *Beall*; that the company had never carried on, and was never intended to carry on any business, and the sole object of the formation of the company was that *Beall* might be able improperly and fraudulently to obtain money by the issue of the shares. The Plaintiff claimed rescission of the contract to take shares, repayment by *Beall* and *Webb* of the £600, and in the alternative £1000 damages, and to have the name of the Plaintiff removed from the register.

On the 13th of June, 1887, an order was made at Chambers, on the application of the Plaintiff and for the purpose of obtaining evidence for the trial, "That the *Royal Exchange Bank, Limited*, do at all seasonable times, on reasonable notice, produce at their head office their books containing the account of the Defendant company and the Defendant *Edward Beall* respectively, and that the applicant be at liberty to inspect and peruse the entries in the said books relative to such accounts, and to take copies and abstracts thereof and extracts therefrom at his expense."

This order was made *ex parte* and without any affidavit in support of the application.

The company and *Beall* gave notice of motion that this order might be varied or rescinded, and that an injunction might issue to restrain the *Royal Exchange Bank* from acting upon it.

The motion was heard before Mr. Justice *Kekewich* on the 28th of June, 1887.

Herbert Reed, in support of the motion.

Warmington, Q.C., and *Swinfen Eady*, for the Plaintiff.

Herbert Brown, for the Bank.

KEKEWICH, J.:—

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The first objection to the order made in Chambers is, that sect. 7 of the *Bankers' Books Evidence Act*, 1879 (42 & 43 Vict. c. 11), does not in the case of civil proceedings give jurisdiction to make an *ex parte* order for inspection of the banking account of a party to the cause. In support of that objection the opinion of Mr. Justice *Day* in *Davies* v. *White* (1) was referred to. But the learned Judge himself there said that it was not necessary for him to express any opinion as to the jurisdiction. On the other hand, in *In re Marshfield* (2) the books sought to be inspected were those of a firm in which the testator had been a partner, and there Vice-Chancellor *Bacon* held that any party who before the Act would have had a right to a *subpœna duces tecum* could now obtain an order to inspect and take copies. What the Vice-Chancellor said in that case applies directly where the books in question relate to the accounts of a party to the action. Further, in *Morgan* v. *Haggar* (before Mr. Justice *Denman* and Mr. Justice *Grantham*, 10th of June, 1887) the order was made with respect to the account of a defendant, so that if the expressions of Mr. Justice *Day* amounted to a decision, which they do not, I should feel no difficulty in not following that decision.

The next objection is, that, even if there is jurisdiction to do so, the order ought not to be made *ex parte*, and in *Davies* v. *White* such an order was set aside. If the practice rested on that case my duty would have been to follow it, but I find that in the later case of *Morgan* v. *Haggar* (10th of June, 1887) the order was made *ex parte*, and in *Doyle* v. *Mulkern* (3) it appears from the Registrar's book that on the 24th of March, 1881, an order was made which is on the face of it *ex parte*.

Apart from these authorities my own construction of the Act is, that the order may be made *ex parte*, and that in a proper case it ought to be so made, just as a *subpœna duces tecum* may be issued without notice. I hold that in this case the order was properly made *ex parte*.

It was further objected that the order was made without any evidence in support. But I find that in the cases recorded in the Registrar's book there were not any affidavits, though it appears that there were in *In re Marshfield* (1). My view is, that whether the application should be supported by affidavit or not must depend upon the circumstances of each case. Here the statement of claim contains allegations as to the dealings of *Beall* with money paid and bills given by the Plaintiff, which amounts to an allegation that *Beall* had an account with a bank through which cheques and bills passed. In this particular case therefore there is, as it appears to me, no necessity for an affidavit in support of the application.

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(1) 53 L. J. (Q.B.) 275.

(2) 32 Ch. D. 499.

(3) Reg. Lib. 1881. A. 572.

Lastly, it is said that the order is too wide in its terms, and I agree that it is so. In the present case the matters in question appear to begin from the registration of the company, and the inspection must be limited to the account from that time.

As, however, the Applicants have failed upon every point except the last, I shall not make any order as to costs except that the Applicants do pay the costs of the bank and add them to their own, and that the costs of the Applicants and of the Plaintiff be costs in the action.

C. M.

C. A.

The order was accordingly varied by inserting after the words "the account of the Defendant company and the Defendant *Edward Beall* respectively," the words "as to the said company from the 27th day of October, 1884, the date of the registration of the said company, and as to the said *Edward Beall* from the 25th day of October, 1884."

The company and *Beall* appealed from this order and the order of the 13th of June. The appeal was heard on the 27th, 28th, and 29th of July, 1887.

Herbert Reed, and *G. Eugene Humphreys*, for the Appellants:—

We object to the order on three grounds: (1) that it was made *ex parte*; (2) that it was made without evidence; (3) that its terms are too wide. It was made under the powers of 42 & 43 Vict. c. 11, s. 7. It was never intended that this section should give a right of discovery which did not formerly exist. The order ought not to be made *ex parte*, *Davies* v. *White* (1), so as to expose a person's private account without notice to him, and to deprive him of the power of sealing up parts which are irrelevant. The words "any other party" in the clause do not refer to parties to the action. It is not reasonable that it should be made without evidence that the entries are material for the purposes of the action.

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(1) 32 Ch. D. 499.

Swinfen Eady, for the Plaintiff:—

Sect. 7 does not require an affidavit, and the nature of the case on the pleadings shews that entries of this kind may be most material.

Before these Acts any litigant might have issued a *subpœna duces tecum*, and have had the books in Court. The account could then be put in against the customer.

[COTTON, L.J.:—Not without proof that it had been recognised by the customer.]

The right to a *subpœna duces tecum* is taken away by sects. 3 and 6 of the Act of 1876, and production of the books can only be obtained in this way. Any party who could before the Act have sued out a *subpœna duces tecum* is now entitled to an order under the Act: *In re Marshfield* (2). The words in sect. 7 are wider than the words in an affidavit as to documents made by a party. The allegations of the statement of claim in respect of which we wish to see the books are, that the money paid for the Plaintiff's shares passed through the hands of *Beall*, that there are hardly any *bonâ fide* shareholders, and that money received has been improperly applied by *Beall*.

[BOWEN, L.J.:—I am not satisfied that you are entitled under the Act to inspect anything except documents of which you may want copies for evidence.]

We must inspect the books to find out what copies are required. I contend that as before the Act we could have had these books in Court under a *subpœna duces tecum*, and examined upon them, we are entitled to inspection under the Act and to take copies,

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(1) 53 L. J. (Q.B.) 275.

(2) 32 Ch. D. 499.

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which by the Act are made evidence against every one: *Harding* v. *Williams* (1). As to the order being made *ex parte*——

[*Per Curiam*:—You need not address yourself to that, nor to the words "any other party," nor as to the *bona fides* of the application.]

Humphreys, in reply:—

There is no reported case in which general inspection of the private banking account of a party to an action has been allowed.

COTTON, L.J.:—

This is an appeal from an order made in Chambers for the production of bankers' books, and subsequently modified by Mr. Justice *Kekewich* in Court. Various objections are taken to the order. The first was that the order ought not to have been made *ex parte*. We have heard nothing to shew that an order for production ought not to have been made, and, if the Act gives the Judge jurisdiction to make it *ex parte*, we cannot discharge it merely because we think it better that such orders should not in general be made *ex parte*. I am of opinion that the Act 42 & 43 Vict. c. 11, s. 7, does give the Judge such jurisdiction. It says that the order may be made "either with or without summoning the bank or any other party." It is urged that "party" here does not mean "party to the action," but it must include parties to the action. There is, therefore, power to make the order *ex parte*, though under ordinary circumstances I think it better that the person whose account is to be looked at should be served.

Another objection was that the order was made without any affidavit. In my opinion an affidavit is not necessary. It may be that in some cases the Court might in its discretion require an affidavit to shew that the inspection sought was material for the purposes of the action, but if that appears from the pleadings there is no occasion for an affidavit. Though pleadings do not shew that the allegations of fact contained in them are true, they shew the nature of the case and of the evidence required to support it. In some cases an affidavit as to *bona fides* might be required. In the present case there is no question as to the materiality of these accounts to the issues raised, the Court has not to decide any preliminary point before ordering production, and the objection that the order was made without evidence fails.

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(1) 14 Ch. D. 197.

Then is the order in other respects right? The main object of the section is to enable evidence to be given at the trial. I do not say that it cannot be used for any other purpose; but in the present case the object sought is to obtain evidence for the trial. If any attempt were made to use the information thus obtained for purposes other than those of the action the Court would interfere. Now, what is the object of this Act? It takes away the power of summoning a banker to produce his books at the trial. So far it is an act for the relief of bankers—it relieves them from the great inconvenience of having to attend at the trial and bring with them books which are in daily use in their business. Then it enables copies of the entries to be given in evidence. How can the suitor know what entries are wanted? Only by examination of the books, and though this order gives a wider power of inspection than a suitor had before, it is an inspection for the very purpose of the Act. It was urged, and I was at first struck by the observation, that this is making the Act give a power of discovery. But that is a fallacy. This is not giving the Plaintiff discovery from the Defendant to assist the Plaintiff's case, but giving him a power of examination for the purpose of ascertaining what copies he will require for the purpose of being put in evidence.

The examination of the books is to be only for the purposes of the action, and the Judge ought to be careful not to make his order wider than necessary. I have considered whether we could introduce into this order any further limitations without narrowing it too much, but I cannot see how to do it. The order does not cover too wide a space, and if we limited it further we might shut out very material entries. In some cases an order of a more limited description might be proper; but I do not see my way to any further limitations in the present case. It was argued that the Act only enables the entries to be inspected, not the books; but that is mere matter of form, the argument is verbal, not substantial.

Bowen, L.J.:—

I am of the same opinion. I also think that great caution should be exercised in acting under this power, and I have no reason to doubt that the Judges do exercise such caution. Consider the state of the law at the time when the Act of 1876 was passed. At that time there was no power of discovering the contents of a banker's books except by the circuitous process provided by the *Common Law Procedure Act*, a cumbrous process which was hardly ever used. In practice a *subpœna duces tecum* was issued, and a clerk was called to refresh his memory by the entries. In no other way could the books be put in evidence. In practice no counsel ever thought of insisting on the laborious proof of all the items, and practically the book was put in as if it had been a pass-book approved by the customer. Then the *Bankers' Books Evidence Act* was passed for the benefit of bankers, but containing also provisions for the benefit of suitors. I do not say whether this section might not be used for the purpose of discovery in cases where there would have been a right to production of the books if they had been in the hands of the customer. In the present case we must look at the section to see what is the proper limitation to be imposed when the order is merely made for the purposes of the hearing. It seems to me obvious that, the object of the section being to enable the applicant to get copies of the entries, inspection is necessary in order to determine what entries should be copied, and the Judge should in such a case be careful as far as possible to limit the order to entries which may be wanted. In the present instance it is impossible to say that this order will do more than is necessary to enable the Plaintiff to get copies of the requisite entries. If we could see any indirect attempt to use this power for purposes not intended by the Legislature, or that a wider power of inspection was given by this order than is necessary for its proper purpose, we would impose some further limitations; but I see nothing to lead to a suspicion of any improper object, nor can I see that the order is too wide. It is said that the Court ought not to make

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an order without an affidavit. There may be cases where an affidavit would be necessary, but on the pleadings here fraud extending over the whole period in which the entries are is alleged, and nobody doubts but that a *bonâ fide* attempt is about to be made to establish the allegation, and it is manifest that these entries may be material.

As to the order having been made *ex parte*, I agree with the Lord Justice *Cotton*. I think a Judge ought to be careful about making such orders *ex parte*, but I think he has jurisdiction to do so.

FRY, L.J.:—

I concur. I agree with what the Lord Justice *Cotton* has said as to making these orders *ex parte*. I cannot read "other party" as not including parties to the action, and I cannot agree with the contention that it is to be construed as "person not a party to the action." I should myself rarely make such orders *ex parte*, but there is jurisdiction to do it, and that jurisdiction has been exercised here after full consideration.

Then as to the general construction of the Act, it is said that this order gives the Plaintiff a discovery of documents which he has no right to inspect. But this inspection is necessary for the purposes of the Act. Before the Act it was necessary to call the banker by a *subpœna duces tecum*, and the party could not see the books till they were put in. The books are not now to be produced, but copies are to be used. How are copies to be obtained? The party requiring them cannot call on his adversary for copies; he therefore must himself make a copy, and he must have liberty to look at the books for that purpose.

The legislation on this subject began in 1876. The Act of that year (39 & 40 Vict. c. 48) in its preamble states two objects: "Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings, and whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books." I see no reason to suppose that when the Act of 1879 (42 & 43 Vict. c. 11) was substituted for

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this Act, the Legislature had not the same two motives. I think, therefore, that the facilitating the proof of the transactions recorded in the books was as much an object of the Act as the relief of bankers. The right to inspection appears to me a necessary result of the provisions of the Act.

Solicitors for the Plaintiff: *Blair & W. B. Girling.*
Solicitors for the Defendants: *Beall & Co.*
Solicitors for the Bank: *Snell, Son, & Greenip.*

H. C. J.

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July 8, 9, 11, 12, 14, 15; *Aug.* 4.

PROCTOR *v.* BENNIS.

[1886. P. 4943.]

Patent—Combination—Novelty of Parts—Infringement of Patent for Combination—Acquiescence—Estoppel.

Where a patent is taken out for a combination, it is not material to its validity that the specification should point out what parts are old and what are new, though, if an alleged infringement consists only in taking part of the combination, it is necessary that the patentee should in his specification have claimed the part so taken as new. Neither is it necessary that the patentee should explain the novelty and the merit of the invention.

Foxwell v. *Bostock* (1) explained.

A patent for a combination of known mechanical contrivances producing a new result, held to be infringed by a machine producing the same result by a combination of mechanical equivalents of the above contrivances, with some alterations and omissions, which did not prevent the new machine from being one which took the substance and essence of the patented invention.

Curtis v. *Platt* (2) distinguished on the ground that there the result was old, and the novelty of the invention consisting only in improvements in a known machine for producing that known result, the patentee was to be tied down strictly to the mode which he had described of effecting the improvements.

In an action by *P.*, patentee of a stoking machine, for infringement against persons who had purchased stoking machines made by *B.*, it was proved that before the purchase *P.*, knowing that they were going to set up stoking machines, went to them and asked them to try his machine, saying that they would find it a better machine than *B.'s*, without giving any intimation that he considered *B.'s* machine to be an infringement of his patent, though he admitted that he did at that time consider it to be so and intended to take legal proceedings when he was in funds:—

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(1) 4 D. J. & S. 298.

(2) 3 Ch. D. 135, n.; 35 L. J. (Ch.) 852.

Held, by the Vice-Chancellor of the County Palatine, that *P.* had by his conduct debarred himself from relief against the purchasers:

Held, on appeal, that as the purchasers did not depose that when they bought *B.'s* machines they were ignorant of *P.'s* patent, nor was there any reason to believe that they were ignorant of it, or that *P.* supposed them to be so, *P.* had not on the ground of acquiescence or estoppel lost his right to sue them for an infringement in using *B.'s* machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, and *P.'s* conduct not amounting to a representation that it was not an infringement.

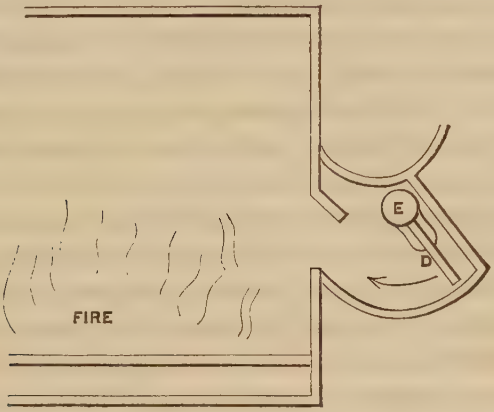
THIS was an action to restrain the infringement of a patent. The Defendant *Bennis* manufactured the machines alleged to be an infringement, the other Defendants, *Crosses & Winkworth* and *Greenhalgh & Shaw*, had purchased such machines from *Bennis* and were using them.

The Plaintiff's patent was dated the 3rd of June, 1875, and the specification described his invention as follows:—

"This invention has for its object improved and self-acting mechanism for supplying to and distributing fuel at intervals over the fire surface.

"The construction and action of the apparatus is as follows:— I employ an ordinary feed-hopper applied to the front of the boiler, which by means of spiked or other rollers will give a supply of fuel, the fuel is received upon an inclined door or flap working within guide plates, the door or flap is secured to cross shafts to which by means of lever and tappets a partial turn or rotary motion is given drawing back the door or flap until the tappet shall have passed its throw, whereon the partial rotation of the shaft is suddenly reversed by means of a coiled spring or weight applied thereto—by such reversing action, the door or flap attached to the shaft receives a rapid forward movement in the direction of the furnace bars, throwing and distributing the fuel over a portion of the fire. The tappet is provided with two or more varying throws so that the spring will be coiled more or less as the fuel is to be alternately thrown on to the fire surface at the front, midway, or back of the fire surface. The tappet shaft receives motion from a worm and worm-wheel. Such being the nature and object of this my said invention, I will now proceed to describe the same in detail, and in order that the invention may be fully understood I have hereunto annexed two sheets of drawings and have marked the same with figures and letters of reference, the same letter referring to the same part in the various views or figures, of which Fig. 1 is a front elevation of a two-flued boiler having my improved apparatus applied thereto. Fig. 2 is an end view. Fig. 3 is a section on the line A, B, of Fig. 1. Fig. 4 is a plan view of Fig. 1. Figs. 5, 6, 7, 8, 9, and 10, are details of parts detached and drawn to an enlarged scale (about one-fourth full size). At A is the feed-hopper applied to the front of the boiler, which by means of spiked or other rollers B, B, will give a supply of fuel to the conical cylinders C, C. The fuel is received upon the inclined doors or flaps D, D, working within guide plates, the said doors or flaps are each secured to cross-shafts E, E, to which, by means of levers, F, F, and tappets G, G, a partial turn or rotary motion is given drawing back the door or flap until the said tappets G, G shall have passed its throw, whereon the partial rotation of the shaft E is suddenly reversed by means of a coiled spring H or a weight applied thereto, by such reversing action the door or flap attached to the shafts E, E receives a rapid forward movement in the direction of the furnace bars throwing and distributing the fuel over a portion of the fire. The tappet is provided with two or more varying throws (see Fig. 6) so that the spring will be coiled more or less as the fuel is to be alternately thrown on to the fire surface at the front, midway, or back of the fire surface. The tappet shafts J, J receive their motion from worms K, K and worm-wheels K^1, K^1 on the shafts J, J and L^1 (which shaft L^1 is driven by the fast and loose pulleys M, M). There is also on this shaft another worm and worm-wheel, N, for operating the spiked rollers by means of the vertical shaft P, and on the shaft is an eccentric and strap R, which operates the lever S, giving a rocking motion thereto, the upper end of the said lever being connected to the piston or ram T, giving to the latter a to-and-fro motion within the cylinders C, C, whereby a positive and regular feed or quantity of fuel is pushed out of the cylinders alternately, and descending upon the double inclines c, c, c, c, reaches the doors D, D, ready to be propelled on the next action.

of the tappet springs and shafts. Having thus described the nature and particulars of this my said invention, together with the manner in which the same is to be or may be performed or carried into practical operation, I would have it understood that I lay no claim to the hopper A, nor to the spiked rollers, nor to the shafts and worms for operating the same, but what I do claim is the employment of the tappets G, G, and shafts E, E, and springs H, when applied to and in connection with the doors D, D as and for the purpose herein fully described and illustrated."



The accompanying diagram, which is a rough copy of part of fig. 3 in the specification, being a section parallel to the length of the furnace and at right angles to the doors or flaps mentioned in the specification, will explain the general nature of the process. The axis E to which the door D is fixed is acted on by a spring tending to turn it in the direction in which the hands of a watch go. The tappet turns E by means of a lever so as to bring the door into the position in which it is represented in the diagram, thus winding up the spring. The tappet then releases the lever, and the spring, turns the door D in the direction indicated by the arrowhead. The coal, which in the meantime has been let down in front of D, is thus jerked out into the furnace by a radial action.

Bennis in April, 1875, had taken out a patent for improvements in mechanically feeding furnaces with fuel. In his apparatus, as in that of the Plaintiff, the coal was thrown into the fire by the sudden action of a spring on a pusher or shovel, but *Bennis's* shovel worked in a rectangular box, and, on being propelled by the spring, drove the coal in front of it into the fire by a direct rectilinear push. He had before taking out his patent tried a radial action but had abandoned it. It appeared that the machine of *Bennis* had not been a success.

Some years after 1875 *Bennis* commenced manufacturing, and in 1882 exhibited at an exhibition in *Manchester*, a self-acting stoker with a radial action substantially the same as that of which the Plaintiff now complained as an infringement. The Plaintiff exhibited his machine there, and saw that of *Bennis*, but did not make any complaint to *Bennis* that it was an infringement; and so again at an exhibition at *Oldham* in the following year. He admitted that he knew of purchasers buying these machines of *Bennis* and did not warn them that he considered them an infringement. He gave as his reason that he left them to take their own course, considering that it was not his business to tell them that they were infringing, and not having at the time money to take proceedings against infringers, which he contemplated doing. He further said he was afraid that if he stated *Bennis's* machine to be an infringement he should be liable to proceedings which he had not funds to defend. In 1882 the Defendants *Greenhalgh & Shaw* purchased from *Bennis* a number of his machines. Shortly before this purchase *Proctor* called on *Greenhalgh & Shaw*, who were using two of *Bennis's* stokers purchased in 1881, and whom he knew to be going to set up others, and asked them to try one of his machines, as they were better than *Bennis's*. They replied that they were satisfied with *Bennis's* machines, and did not feel inclined to run the risk of trying others. The Plaintiff then asked them to try one of his machines before ordering others. Evidence to a similar effect was given by Mr. *Cross*, the managing director of another company, as to solicitation to that company. The Plaintiff also at several interviews with Mr. *Moss*, the managing director of *Crosses & Winkworth*, after 1882 solicited orders, and asked him to give the Plaintiff's stokers a trial, which he declined to do. On none of these occasions did the Plaintiff give any intimation that he considered *Bennis's* machine to be an infringement of his.

The machine made by *Bennis* of which the Plaintiff complained was very different in appearance from that of the Plaintiff, but in each the action was a radial action; the motion in one direction being produced by tappets and in the opposite direction by a spring. In *Bennis's* machine there was no shaft E, but the shovel was carried by an arm which turned upon a pin, and this arm was acted upon directly by the tappets.

Bennis by his statement of defence denied infringement and denied the validity of the Plaintiff's patent. By his particulars of objection he alleged that the Plaintiff's alleged invention was not new—that it was used by *Bennis* and another manufacturer in April, 1875, and that a prior publication of the combination which the Plaintiff claimed had been made by a patent granted to *Church* in 1829, and by *Bennis's* patent of April, 1875. The other Defendants relied on these defences and also on acquiescence by the Plaintiff in their purchases.

The Vice-Chancellor of the county palatine of *Lancaster* held that the Plaintiff's patent was good, and had been infringed by the Defendants, and he gave judgment against *Bennis*, but dismissed the action as against the other Defendants on the ground that the Plaintiff had by acquiescence debarred himself from relief against them (1).

(1) BRISTOWE, V.C., (after disposing of the case as against *Bennis*):—

It remains to deal with the relief sought against the other Defendants. Here I think that a different state of circumstances has to be considered. The Defendants, Messrs. *Crosses & Winkworth* and Messrs. *Greenhalgh & Shaw*, are merely users of the Defendant's machines, and in my opinion they were and are not only innocent users thereof, but they were so with the full knowledge of the Plaintiff. It is in my judgment impossible to look upon the conduct of the Plaintiff as disclosed by his own evidence on this subject, supplemented as it is by the evidence of Messrs. *Shaw*, *Moss*, and *E. Cross*, without feeling that in fact he allowed those Defendants to become purchasers of the Defendant *Bennis's* machines after an open competition of those very machines manufactured by Mr. *Bennis* with those of the Plaintiff, and which machines so manufactured by Mr. *Bennis* the Plaintiff considered at the time to be an infringement of his patent, and which he says when a convenient time arrived he meant to attack as infringements. The Plaintiff's conduct in this matter was in my judgment acquiescence amounting in a legal sense to fraud, and he is not in my judgment now entitled in a Court of Equity to obtain any relief against the Messrs. *Crosses & Winkworth* and Messrs. *Greenhalgh & Shaw* by reason of his conduct towards them as stated in his own evidence and in the evidence of Messrs. *Shaw*, *Moss*, and *E. Cross* already referred to.

I have however some difficulty as

The Defendant *Bennis* appealed from the judgment against himself, and the Plaintiff appealed from so much of the judgment as dismissed the action against the other Defendants. The appeals were heard on July 8, 9, 11, 12, 14, 15.

Sir *R. Webster*, A.G., *Moulton*, Q.C., and *Maberly*, for the Plaintiff, in support of his appeal:—

The Vice-Chancellor's decision as to acquiescence is hard to be understood. If his Honour means that the Plaintiff led the Defendants other than *Bennis* to buy *Bennis's* machines under the belief that he assented to their doing so, why was any distinction drawn between past and future user? At all events the question of future user ought not to have been left open, it should have been decided whether these Defendants are entitled to go on using the machines they had bought or not. But we say that the Plaintiff has not lost his right against these Defendants at all. Either they had a license from the Plaintiff to

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to whether I ought to dismiss the action as against Messrs. *Crosse & Winkworth* and Messrs. *Greenhalgh & Shaw* with costs to be paid by the Plaintiff, or whether I ought to add to such an order some qualification such as "such costs not to include or to be increased by the allegations of the said Defendants that the Plaintiff's specification was insufficient and misleading and that the Plaintiff was not the first and true inventor, and that the invention was not a new invention, and that the Defendants had not infringed the same," inasmuch as on these points I have in fact found in favour of the Plaintiff and against those Defendants, but bearing in mind that the Plaintiff never before action sufficiently called the attention of those Defendants to the specific claims asserted by him, never gave them an opportunity after sufficient knowledge of the facts to give up using the invention claimed to be an infringement of the Plaintiff's patent, and never till the action was about to be brought against them ever gave those Defendants any notice whatever of the case intended to be made against them, and also bearing in mind the Plaintiff's conduct towards these Defendants in allowing them to become the purchasers of the machines manufactured by Mr. *Bennis*, though he, the Plaintiff, then considered that such machines were an infringement of his patent rights in respect of which infringement he then contemplated taking legal proceedings, I feel unable to come to any other conclusion than that the action as against Messrs. *Crosses & Winkworth, Limited*, and Messrs. *Greenhalgh & Shaw*, must be dismissed with costs. I would, however, observe that if they continue to use the machines manufactured by the Defendant, which I hold to be infringements of the Plaintiff's patent, they will of course do so at their own peril, and will have to abide the consequences arising therefrom.

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use these machines or they had not. Nothing short of a license will do. There was no acquiescence by the Plaintiff, and it was no duty of his to tell these Defendants that the things they were buying were infringements of his patent. He would have exposed himself to an action if he had done so, and he was at that time a poor man unable to bear the expense of litigation. The Defendants have not been induced to alter their position by anything the Plaintiff said or did.

[It was arranged that the question of acquiescence should be argued only by the counsel for *Crosses & Winkworth* and *Greenhalgh & Shaw*, and that they should leave the argument against the validity of the patent to the counsel for *Bennis.*]

Rigby, Q.C., and *Bather*, for *Crosses & Winkworth*, and *Clare* for *Greenhalgh & Shaw*:—

We say, in the first place, that it is to be concluded from the evidence that these parties did not think that they were infringing any right of the Plaintiff.

[FRY, L.J.:—They do not say that they did not know of the Plaintiff's patent, and it is to be presumed that they did know of it.]

The Plaintiff proposed to these Defendants competition between his and *Bennis's* machines, and agreed to abide by the result of the trial. He said in substance: "If you find *Bennis's* machine the better one you will of course buy it." The presumption is that a man may lawfully use what he buys without the patentee making any objection. The Plaintiff never suggested that there was any reason why they should buy his machine and not *Bennis's*, except that his was the better. We have here all the elements that are requisite for estopping the patentee. As to his fear of an action no one ever heard of an action being brought because a patentee erroneously stated a machine to be an infringement of his patent: *Halsey* v. *Brotherhood* (1).

[*Moulton*:—The law is altered by the *Patents Act* of 1883 sect. 32.

FRY, L.J., referred to *Carr* v. *London and North Western Railway Company* (2) as to estoppel.]

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(1) 19 Ch. D. 386.

(2) Law Rep. 10 C. P. 307.

As to the point suggested by the Court that the Defendants are to be presumed to know of the Plaintiff's patent, assuming that to be so, it is not to be presumed that they knew what they were doing to be an infringement of it. As the Plaintiff did not say that it was, but met *Bennis* on terms of rivalry, the purchasers would be led to believe that there was no infringement.

[COTTON, L.J.—If a purchaser knows of the existence of a patent can you bring the case within the rules as to lying by? Is not the principle this, that if I see a man acting in derogation of my rights without knowing that I have any, I am bound to tell him of them; but if he knows I have rights, and puts an erroneous construction on them, is there any obligation on me to warn him? Have you any case that goes that length?]

Wilmott v. *Barber* (1) lays down the rules as to lying by, and we contend that this case comes within them. When a patentee acts as the Plaintiff did, he leads the purchasers to believe that he does not complain. The Court has referred to *Carr* v. *London and North Western Railway Company* (2). As to the first proposition there laid down (3), we have nothing to say, for we do not allege wilful false statement. As to the second proposition (4), we say that the Plaintiff by his conduct made a representation to the effect that there was no objection to our buying *Bennis's* machines if we thought them the best, and the case also comes within the third proposition. We do not rely on the fourth proposition (5). The case, as we contend, not only comes within the rules in *Wilmott* v. *Barber*, but also within *Cairncross* v. *Lorimer* (6), and the principles as to acquiescence in *Duke of Leeds* v. *Earl of Amherst* (7) and *De Bussche* v. *Alt* (8).

THE COURT then called on Mr. *Aston* to open *Bennis's* appeal.

Aston, Q.C., and *W. R. Bousfield*, for *Bennis*:—

We deny any infringement of the particular combination which is claimed as the Plaintiff's invention. The Plaintiff's specification is bad from not indicating which of the elements forming the combination are new and which are old: *Clark* v. *Adie* (1). It is also bad on the ground of want of novelty, having been anticipated by the invention of *Bennis* and also by the patent of *Stanley*, who used rotatory motion. The Plaintiff's invention is, in fact, an infringement of *Bennis's* patent. Our first point is that *Bennis* has not infringed the Plaintiff's patent. The shafts are different in size, action, and position. The doors are different in size, action, and position. *Bennis* has taken none of the four elements of the Plaintiff's combination, the shafts, tappets, springs, and doors, nor their combination. We say that the Plaintiff has not made a good claim for a combination: *Foxwell* v. *Bostock* (2); but if he has, and if his patent is valid on that ground, he must in order to prove infringement shew that we have taken the very component parts the combination of which he claims; he is strictly tied down to what he has described: *Curtis* v. *Platt* (3); and he cannot rely on our having used mechanical equivalents for his component parts. Radial action is not new, there was a radial action in *Stanley's* patent. But suppose the patent good, we have taken nothing but the radial action, and he does not claim that as his invention. In the second place, the Plaintiff's patent was no real improvement on *Bennis's* patent. It only covered such alterations as a workman might make in *Bennis's* machine of his own accord, and the same remark applies to the machines which *Bennis* is now selling. The radial action was no real advantage: our horizontal action produces equally good results. Therefore the Plaintiff's patent is invalid against us. The Crown cannot derogate from the effect of its previous grant: *Ex parte Bates & Redgate* (4).

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(1) 15 Ch. D. 96.
(2) Law Rep. 10 C. P. 307.
(3) Ibid. 316.
(4) Ibid. 317.
(5) Law Rep. 10 C. P. 318.
(6) 3 Macq. 827.
(7) 2 Ph. 117, 123.
(8) 8 Ch. D. 286, 314.

Sir *R. Webster*, A.G., *Moulton*, Q.C., and *Maberly*, for the Plaintiff:—

[COTTON, L.J.:—We do not trouble you to reply on the Plaintiff's appeal.]

There is nothing ambiguous or misleading in the Plaintiff's specification. It defines with sufficient clearness in what the

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(1) 2 App. Cas. 315, 325, 326.

(2) 4 D. J. & S. 298.

(3) 3 Ch. D. 135, n.; 35 L. J. (Ch.) 852.

(4) Law Rep. 4 Ch. 577.

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Plaintiff's invention consists, viz., the combination of certain component parts to produce a new result, the Plaintiff not claiming separately the right to each or any of the component parts. Until the Plaintiff's machine no one ever used a radial flap or shovel worked intermittently: the machine is a new contrivance for throwing coal over a fire in small portions from time to time by an intermittent radial action. The contrivance is different in principle from the former machines which are alleged to be anticipations. In order for *Bennis's* patent to avoid the Plaintiff's as being a prior publication it must contain a description such that an ordinary competent workman would be able to make the machine from it: *Hill* v. *Evans* (1). That is what *Bennis's* patent does not do. It is contended indeed that the machines now made by *Bennis*, of which the Plaintiff complains, only differ from the specification of *Bennis's* by variations which a skilled workman might introduce without any invention; but the evidence does not support that, and it is manifest that a change from rectilinear to radial action is not one which an ordinary workman would introduce. It required invention, and was the turning point from failure to success. Then as to our being held strictly to the combination which we have claimed, a distinction is taken in the cases between a new combination to produce an old result and a new combination to produce a new result. *Curtis* v. *Platt* (2), which is relied on by *Bennis*, admits this distinction. The patentee is held more strictly to his description in the former case than in the latter. This distinction is consistent with all the cases: *Clark* v. *Adie* (3); *Nordenfelt* v. *Gardner* (4). The object is new, and what is to be looked to is whether the substance of the combination has not been taken with a mere substitution of mechanical equivalents for some of its parts.

Aston, in reply:—

The Plaintiff here has claimed a certain combination for the old object of throwing coal into a furnace. He lays claim to no principle nor to any subordinate combination. Unless therefore the Defendants have taken the combination of four things which

(1) 4 D. F. & J. 288.
(2) 3 Ch. D. 135, n.; 35 L. J. (Ch.) 852.
(3) 2 App. Cas. 315, 320.
(4) 1 Rep. Pat. Cas. 61, 65.

he specifies his action must fail. In *Dudgeon* v. *Thomson* (1) there was a new machine, producing a new result, but the patentee was held strictly to his combination as described.

1887. Aug. 4. COTTON, L.J. :—

This is an action by Mr. *Proctor* to restrain the infringement of the patent obtained by him in June, 1875. The Defendants are *Edward Bennis,* who is a rival manufacturer, and who had also himself taken out a patent for a similar invention in April, 1875—the other Defendants, *Greenhalgh & Shaw* and *Crosses & Winkworth,* are persons who had bought from *Bennis* and were using machines made by him. There are two appeals—one by the Plaintiff against the decision of the Vice-Chancellor in favour of the latter class of Defendants—the other by *Bennis,* judgment having been given in favour of the Plaintiff as against him. The Vice-Chancellor decided that the Plaintiff had a good patent, that the Defendants had infringed it, and that there was nothing to bar the Plaintiff's right to relief as against *Bennis,* but he decided in favour of the Defendants who bought from *Bennis,* on the ground that although the Plaintiff had a good patent which they had infringed, he had so acted as to deprive himself of his right against them.

I think it is more convenient to take first the question raised by *Edward Bennis'* counsel, whose contention was that there was no patent in respect of which it could be established that any infringement had been committed by *Edward Bennis,* and although *Bennis* relied also on the point which the Vice-Chancellor decided in favour of the other Defendants, his counsel did not argue that but left it to their counsel.

The first question which we have to consider is—What is it that the Plaintiff claims by his specification? I shall have to consider hereafter the detail of the combination which he claims. It is sufficient to state now that his claim is for a combination forming a machine to distribute coal on fires or furnaces, and it is a combination and nothing else that he claims. It was not contested that it was useful, and it was not seriously contended that it had been anticipated. [His Lordship here referred to two previous inventions, and stated that they did not possess what was the essence of the Plaintiff's combination.] It was contended before us that the Plaintiff's specification was not good because it did not point out what he admitted to be old and what he considered to be new. That contention was connected with this argument—that the infringement complained of was an infringement, not of the combination, but of some subsidiary combination or some particular portion in the Plaintiff's machine. That argument in my opinion is erroneous, because the case made by the Plaintiff is that the Defendants have infringed the combination which was patented, but it is desirable to deal with the objection to the specification. What was relied on by the counsel for *Bennis* was the opinion expressed by Lord *Westbury* in *Foxwell* v. *Bostock* (1). But that must be read with the light thrown upon it by the opinion expressed in the House of Lords by Lord *Cairns* in *Harrison* v. *Anderston Foundry Company* (2). Lord *Cairns* there says: "The first is an objection said to be founded upon the case of *Foxwell* v. *Bostock*, decided by the late Lord *Westbury* when Lord Chancellor. It is said to have been determined in that case that where there is a patent for a combination there must be a discovery or explanation of the novelty, and the specification must shew what is the novelty, and what is the merit of the invention. I cannot think that, as applied to a patent for a combination, this is, or was meant to be, the effect of the decision in *Foxwell* v. *Bostock*. If there is a patent for a combination, the combination itself is, *ex necessitate*, the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also with regard to the discrimination between what is new and what is old. If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used, and it is in that way immaterial whether any or which of the parts are new."

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(1) 3 App. Cas. 34, 39, 45.

In my opinion it is of necessity, apart from this expression of opinion by Lord *Cairns*, that where a combination is claimed to be an invention then, if that invention is new, it is immaterial on the question of the validity of the specification and the goodness of the patent whether the patentee has pointed out how far he does or does not claim particular portions. Of course if the alleged infringement had been the taking a subsidiary portion of this combination—particular parts of the machinery which formed the combination, it would have been material; but here the Plaintiff in his claim cuts himself down entirely to the combination, pointing out that he does not claim the particular portions of that, but simply claims the combination of four parts—the combination of the tappets, shafts and springs with his flaps or doors.

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(1) 4 D. J. & S. 298.

(2) 1 App. Cas. 574, 577.

It was further contended by Mr. *Aston* that all the differences between the machine which *Bennis* is making and selling and the machine specified in his patent of April, 1875, which was prior to that of the Plaintiff, were mere alterations which any workman could introduce as a variation of that machine without any invention whatever so as to make it the subject of a good patent, and that as he had got a patent which would cover all such additions or variations as could be made by an ordinary workman without invention from the descriptions in his specification, it was impossible that the latter grant to the Plaintiff should prevent him the Defendant from using that which was really described in his own patent. But is the difference between the Defendant's machine as described in his specification and the machines which he is now making of the character which was urged? In my opinion on looking at the machinery one would come to a different conclusion, and it is remarkable that the only witness who supports this contention of the Defendant *Bennis* is his scientific witness, a gentleman of the very highest attainments as a scientific witness, but not a practical man employed in making these machines. No workman was called to say that these variations would have occurred to him or were such as he would have introduced without any invention. And there is this remarkable fact that *Bennis* before taking out his patent in 1875 had himself tried the action of a door or flap which was something like that in the Plaintiff's machine, but had abandoned it, on the ground that it would not work with the machinery to which he proposed to adapt it. It would be singular that this variation which has made a machine effectual, while the patented machine of *Bennis* seems never to have come into practical use, should be considered a mere obvious variation not requiring any invention.

We then come to this point. Is there an infringement? The patent is good, the specification in my opinion is good, but is there an infringement? Now, as I have already stated, the contention of the Plaintiff is not that parts of his machinery have been taken for which he has a right to protection, but that his combination has been taken. It is obvious that *Bennis* has not taken absolutely and exactly the combination which the Plaintiff has patented. But the question to my mind which we have to consider is this—Has the combination in substance been taken? Has the Defendant, though not exactly taking the whole combination which has been patented, taken, by slight variations or by mechanical equivalents, the substance of it, so as to produce the same result by practically the same means? Let us look at the Plaintiff's specification. First of all he describes generally the construction and action of the apparatus, and points out this:—that by a combination of tappets, shafts, springs, and flaps, so arranged that the flaps have an intermittent reciprocating radial action, and with a force varying from time to time but at regular intervals, he makes a machine which throws coal on to the furnace. Then he says, "such being the nature and object of this my invention I will proceed to describe the same in detail, and in order that the invention may be fully understood I have hereunto annexed two sheets of drawings." That does not in my mind cut down what he had previously stated as to the mode in which his invention is to be carried into effect, and the result which is to be produced by it, but expresses that he is going to give examples and statements in detail to shew how that is done in his machine. Then we come to his claim, which I think I had better read in detail: "Having thus described the nature and particulars of this my said invention, together with the manner in which the same is to be or may be performed or carried into practical operation, I would have it understood that I lay no claim to the hopper A, nor to the spiked rollers, nor to the shafts and worms for operating the same—but what I do claim is the employment of tappets GG and shafts EE and spring H when applied to and in connection with the doors DD, as and for the

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purpose herein fully described and illustrated." Now the ingenuity of counsel produced the argument that this does not claim a combination. I agree that it does not contain the word "combination," but what is here claimed is to my mind essentially a combination and nothing else. It is the employment of tappets, shafts, and springs in connection with doors DD as and for the purpose herein fully described and illustrated. The argument that a man who claims the use of certain mechanical means in connection with certain other things does not claim a combination to my mind really requires no answer. A combination is the use of certain things in connection with others to produce a machine, and that is what is here claimed.

Now what has the Defendant done? If you look at his machine you say at the first glance, "That is something different from the Plaintiff's machine." It does look a different machine, but we must consider whether in substance, although he has not taken the exact combination of the Plaintiff, he has not merely substituted for the particular parts of the Plaintiff's machine ordinary mechanical equivalents for producing the same effects; and if he has done so then, in my opinion, although he has not taken the exact combination, he has taken the essence of it, and therefore his machine is what is sometimes called a colourable variation; or, in plain terms, is an infringement of the Plaintiff's patent.

Now let us see what the variations are. [His Lordship entered into an examination of the differences between the two machines.] In my opinion, although the Defendant has not got the exact combination of the Plaintiff, yet he has got it in substance and result by putting mere mechanical equivalents for elements of the Plaintiff's combination which is protected by his patent. Several of the Plaintiff's witnesses support this view.

The Appellant much relied on this, that there are certain omissions in the Defendant's machine of parts which there are in the Plaintiff's combination; that there are certain things in the Defendant's machine not found in the Plaintiff's, and producing a result which is not obtained in the Plaintiff's machine. And it is said that that must prevent what has been done by the Defendant from being considered as an infringement of the Plaintiff's machine. But if the Defendant has by any additions made an improvement which would be a subject for letters patent, that will not enable him to take the Plaintiff's combination and apply his improvements to it.

Counsel for *Bennis* further relied not only on the additions but on the omissions. In my opinion omissions and additions may be very material in considering whether in fact the machine of the Defendant is an infringement of the combination which the Plaintiff claims; but if the Defendant really has taken the substance and essence of the Plaintiff's combination, the mere fact that certain parts are omitted or certain parts added cannot prevent his machine from being an infringement of the Plaintiff's patent.

Then it was said that we were precluded from going into that in this case by what was laid down by three Judges, Lord *Hatherley*, Lord *Westbury*, and Lord *Cranworth* in the case of *Curtis* v. *Platt* (1), in the various stages through which that case went. Of course, whatever our own view might be, we ought not to act contrary to any principle that has been laid down by them. The principle alleged to have been so laid down was that where an invention is claimed for improvements in machinery consisting only in a combination, there the patentee must be held to the description which he gives of the particular means by which his invention is to be carried into effect, and that the doctrine of mechanical equivalents cannot apply. In my opinion that case does not apply to the present, because the observations there made were applied to a case where the patent was for an improvement in a machine which had been long in use for producing a certain result. There was no novelty in the results to be produced, and the only novelty which could be claimed was the application and use of certain mechanical means in order to produce in a known machine the same result which in that known machine had been produced by other mechanical means. That, to my mind, distinguishes the case from the present. The plaintiff was the patentee or assignee of a patent for improvements in spinning mules. Spinning mules were well known machines working and acting long before that patent was

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(1) 3 Ch. D. 135, n.; 35 L. J. (Ch.) 852.

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taken out, and it was necessary in those machines that there should be an intermission of the action of certain parts, although the motive power was still acting on the machine as a whole. That result had been produced before the patent in question by, amongst other means, the methods patented by *Roberts*, *Lakin* and *Rhodes*, and they had done it by adopting certain mechanical means. What the patentee whose patent was relied on by the plaintiff did, was to correct and improve the machines which they describe in their patents, for the purpose of obtaining that result. We find from the specification (1) that what the patentee claimed was, "The novel construction, combination, and application of mechanism as hereinbefore described, whereby one-half of the clutch or catch-box hereinbefore, and in the said specification of the said *Lakin* and *Rhodes*, described, or any mechanical equivalent therefor, is connected with and acts upon cams or other similar parts of mechanism for effecting the changes in the action of the mule, or other machine of the description before mentioned, direct, and without the intervention or use of such eccentric boss and rods, levers, or other mechanical agents combined therewith as are described by the said *Lakin* and *Rhodes* in their said specification." There he refers to a previous patent, and he also had referred to the previous patent of another patentee. His invention was to produce improvements in the mechanical means and arrangements which the previous patentee had used to obtain well known objects in a well known machine. In applying the words used by the Judges in that case, we must consider the nature of the case before them, and I come to the conclusion that what they meant was—that where there is no novelty in the result, and where the machine is not a new one, but the claim is only for improvements in a known machine for producing a known result, the patentee must be tied down strictly to the invention which he claims and the mode which he points out of effecting the improvement. But here the throwing coal on to the furnace by the intermittent radial action of a flap or door was new. Nothing of the kind had been done before. It is true there had previously been imperfect machines for feeding furnaces automatically, but that had not, previously to this machine, been

(1) 35 L. J. (Ch.) 852, 873.

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done by any intermittent radial action of a flap or door as is done by the Plaintiff. In my opinion, therefore, the opinions expressed by the Judges with reference to mere improvements in an old machine for an old purpose cannot apply to a case like this, where there was not only novelty in the machine but novelty in the result to be produced by that machine. In my judgment, therefore, we must come to the conclusion that here the Defendant *Bennis*, and also the other Defendants, had infringed the Plaintiff's patent, and that, so far as this goes, the appeal of *Bennis* fails.

Then we come to what was, of course, open on both appeals, though it was argued only on the appeal of the Plaintiff—the question whether anything has been done by the Plaintiff which will bar his right to relief as against the Defendants? Now, we must bear in mind that this is not a question as to an interlocutory injunction. If the Plaintiff, after what had taken place, had come here for an interlocutory injunction, it would have been difficult for him to answer some of the arguments which on this part of the case were urged against him, because the Court does not interfere on interlocutory injunction unless the Plaintiff has been prompt, and has not delayed in making his claim against those against whom he seeks relief. But we are at the hearing, and what we must consider is, has his right been barred? I must say I feel a difficulty in understanding the principle on which the Vice-Chancellor decided in favour of the persons who were using these machines, because although he held that the Plaintiff was eutitled to no relief against them, and against them dismissed the action with costs, yet he warned them that after his decision against *Bennis* that there was a good patent, and that the machines which they were using were infringements, they might become liable to have an injunction granted against them. If there was anything to bar the right of the Plaintiff, I cannot see how the Vice-Chancellor's merely laying down what was the law at the time when the action was commenced, as it was when the judgment was given, could in any way alter the position of these Defendants.

But let us consider whether there is anything that bars the Plaintiff's right as against the Defendants. First of all, I will take the argument urged by Mr. *Rigby*. What had taken place was this: that the Defendant *Bennis* and the Plaintiff were rival competitors in the trade of supplying automatic machines for feeding furnaces, and it was on the evidence that when it was known by the Plaintiff that the Defendants other than *Bennis* were about to buy furnace feeding machines from Mr. *Bennis*, the Plaintiff went to them and said in substance: "Now do give mine a trial; you will find it a very much better machine." Mr. *Rigby* contended that this was as much as to say to them: "Now just try and see which is the best machine, and then you may take whichever you think to be the best," and was a permission to them to use the machines made by Mr. *Bennis* if on a trial they were found to be better than those of the Plaintiff. In my opinion, that is not the proper construction of what he said. Undoubtedly Mr. *Proctor* at that time, as he himself has said, considered that the machines which *Bennis* was then making, and which *Greenhalgh & Shaw* and *Crosses & Winkworth* were going to buy, were an infringement. But, in my opinion that does not make his words mean this: "You may use *Bennis's* if you think it better than mine," but only this: "Whatever other objections I may have to *Bennis's* machine, mine is the better one, and without entering into any contest, if mine is better, you will not be so unwise as to have *Bennis's*." That is all it comes to: he is a rival manufacturer, and in order to induce these people to take his machines, says: "Now, try mine, and you will find that it is very much the better." He does not say in terms, but I think he says by implication, "I cannot suppose that you who are engaged in trade will be so foolish, if you find mine is a better machine, to take that of my rival." In my opinion the argument pressed on us by Mr. *Rigby* cannot prevail.

Then it is said that, independently of that argument, there had been a lying-by on the part of the Plaintiff which would, in a Court of Equity prevent him from obtaining any relief. It was also urged that his conduct amounted to a representation that *Bennis's* machine was, in fact, no infringement. Of course, if he made a representation to that effect he would be bound by it, and could not afterwards bring any action against those who acted on that representation, and bought and used *Bennis's* machines. But does the evidence come to that? I will first take the question whether there had been any lying-by, any acquiescence in the proper sense of the word. In my opinion there had not. The right of the patentee does not depend on the Defendant having notice that what he is doing is an infringement. If what the Defendant is doing is, in fact, an infringement, his having acted *bonâ fide* and honestly will not protect him from an injunction. It does not depend upon notice, a monopoly has been granted to the patentee, and what is necessary in order to raise an equity against him is shewn by Lord *Cranworth* in *Ramsden* v. *Dyson* (1): "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers, that when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented." That lays down the principle which was applied to the particular case there under discussion, where it was contended that a landowner had lost his right to recover the land and turn out those who were tenants from year to year or tenants at will, because he had not objected to their building. It is necessary that the person who alleges this lying-by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title. Here none of these Defendants state that they never knew anything about the Plaintiff's patent. In my opinion it must be taken that they did know it, but if they did not, I cannot find anything from which we ought to draw the conclusion that the Plaintiff had reason to suppose that they did not; why should he not suppose that they were acting on the view for which they are now contending that what they were doing was no infringement? In my opinion, the facts of this case do not require us or enable us to hold that the Plaintiff lay-by so as by his silence, with knowledge that the

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(1) Law Rep. 1 H. L. 129, 140.

Defendants were acting in ignorance of his title, to deprive himself of any title to relief which he otherwise would have had.

Then, is there anything like a representation that the machines of *Bennis* were no infringement? It is true that the Plaintiff, as I understand, never said that they were, although he knew it. But in my opinion mere silence, merely not giving notice to the Defendants that what they were doing was an infringement, cannot reasonably be taken as any representation that what they were doing was not an infringement. It would be going much too far to hold that the omission of the patentee to say, "Now, you are infringing my patent," amounted to a representation by him that what the parties were doing was not an infringement. In my opinion there is no evidence to lead us to the conclusion that there was any estoppel against the Plaintiff by a representation made by him to the effect relied on by the Defendant. In my opinion, therefore, the appeal of the Plaintiff ought to succeed, and the appeal of the Defendant *Bennis* ought to fail.

BOWEN, L.J.:—

I am of the same opinion.

First, with regard to the Defendants other than *Bennis*, the Vice-Chancellor decided that the Plaintiff had lost against them whatever rights he originally possessed, owing to conduct or inaction on his part which amounted, either to estoppel, or to acquiescence within the meaning attached to that word by the well-known practice and principles of the Courts of Equity. As to estoppel it seems to me that there is a very short, and I think conclusive, answer to the Respondent's argument. There certainly was no representation made by *Proctor* to the effect that he would not enforce his rights, or that he had got no rights as against these Defendants, nor was there, in my opinion, any conduct which amounted to such a representation. I think that the only plausible ground which Mr. *Rigby* could take was, that there had been acquiescence which precluded the Plaintiff from now raising the question of the infringement of his patent by Mr. *Rigby's* clients. But in order to make out such acquiescence it is necessary for them to establish that the Plaintiff stood by and knowingly allowed the Defendants to proceed and to expend money in

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ignorance of the fact that he had rights and meant to assert such rights. If they made out that case, then a Court of Equity would not afterwards allow the Plaintiff to interfere with them except upon the terms of placing them in the same position, and compensating them for the loss which they had sustained owing to a mistake which he favoured. It seems to me impossible to apply this doctrine to the facts which are before us. Did the Defendants in the first place know of the Plaintiff's patent? They do not say that they did not, and in all probability they knew of its existence as well as the Plaintiff himself. Did they think that the Plaintiff had no rights, and never meant to assert any, and draw from his inaction the inference that they might safely proceed? They do not say so themselves, and how can we assume that men are misled, who, when they are called into the box, will not and do not say so? If they do not say that they were misled, if the patent of the Plaintiff was presumably within their knowledge, why should the Plaintiff suppose that they were ignorant of it? It seems to me that the true inference of fact to be drawn here is, that these Defendants other than *Bennis* were acting at their own peril throughout, and knew throughout that they were so acting. Although they reckoned on security, and although for a long time the Plaintiff did not interfere, there was nothing on the part of the Plaintiff to lull them into security.

I will now briefly state the conclusion at which I have arrived on the question of *Bennis's* patent. Mr. *Aston* in the first place maintained that there was no infringement on the part of his client, and that if there was any, it was only in respect of the radial action of the door, and that this radial action was not put forward in *Proctor's* patent as a substantial element of claim, and that if it had been so put forward it would not have been a good subject matter for a patent. The answer, as it seems to me, is this, that the Plaintiff's claim is for a combination and nothing more, and that when a combination and nothing more is claimed, the combination being a novelty, it is immaterial that the patentee should point out how far he claims novelty for particular portions which go to make up the combination. Those portions are not his claim, but it is putting them together and combining them that constitutes his claim. That seems to me to be the true law as laid down in *Harrison* v. *Anderston Foundry Company* (1), without a reference to which case *Foxwell* v. *Bostock* (2) is liable to be misunderstood. Then again, it was said that there was no difference between the Plaintiff's patent and the prior patent of *Bennis*, except variations which a mechanic of ordinary competency could easily achieve, and that *Bennis* was entitled to stand on his prior grant. To my mind the answer to that is, that there is no evidence upon which I could rely to support that view, and that *Bennis* for five years did not make these variations.

Then, having disposed of the assault upon the validity of the patent, I pass to the question whether there has been any infringement. Has the combination been taken, or a substantial part of it? All has not been taken. Has the Defendant then taken so much as to produce the same result by the same means, or by mere mechanical equivalents for the same means? What is the substance of the invention here? It is a machine acting as an intermittent radial stoker, and it is described in the patent as a combination of tappets, shafts, and springs, in connection with a door. None of these are claimed separately. Mr. *Aston*, and I think Mr. *Bousfield*, addressed to us an ingenious argument with a view of shewing that there was some emphasis laid upon the door which ought to prevent us from treating the whole as a mere claim to a combination. I cannot see that there is any severance of the door from the other subject-matters of the paragraph, which prevents this from being a simple claim for a combination, or which in law renders the combination of the tappets, shafts, springs, and door, anything different from what it would have been if the words "and in connection with" had been left out, and the words had simply been "the tappets G G, and shafts E E, and springs H, when applied to the doors," or "the tappets G G, and shafts E E, and springs H, with the doors." I think the truth is that the doors were in the eye of the inventor an extremely important part of the combination, and gave, so to speak, the key to the whole, and that he therefore

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(1) 1 App. Cas. 574.

(2) 4 D. J. & S. 298.

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employs the language he does, but none are claimed separately. Now I think it goes to the root of this case to remember that this is, as was described by one of the counsel, really a pioneer invention, and it is by the light of that, as it seems to me, that we ought to consider the question whether there have been variations, or omissions, and additions, which prevent the machine which is complained of from being an infringement of the Plaintiff's. With regard to the variations I take precisely the same view that the Lord Justice *Cotton* has taken, and I will not travel over the ground again. With regard to the additions and omissions, it is obvious that additions may be an improvement, and that omissions may be an improvement, but the mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the Plaintiff's patent. The question is not whether the addition is material, or whether the omission is material, but whether what has been taken is the substance and essence of the invention. That seems to me to be the true test as propounded by the House of Lords in *Clark* v. *Adie* (1).

Now in *Curtis* v. *Platt* (2) and other cases it has been said that where the patentee has claimed a particular mechanical device for effecting the object in view, he must be held strictly to that device. But when you are considering an absolutely new invention with a novel result you cannot apply that rule without recollecting that the result effected is new, as well as the combination, and that when there is really an ingenious novelty in the idea that the combination will produce a new result, that novelty in the idea is part of the merit of the very combination. It seems to me here when you consider that for the first time the Plaintiff produced an intermittent radial action of the door, and look at the Defendant's machine, you see that although the Defendant has made variations, he has still taken the substance and essence of the Plaintiff's combination. I do not feel, after the reflection we have given to the case, much doubt that there has been an infringement, and I think that the appeal of the Defendant *Bennis* ought to fail.

(1) 2 App. Cas. 315, 320.

(2) 3 Ch. D. 135, n.; 35 L. J. (Ch.) 852.

Fry, L.J. :—

I have arrived at the same conclusion as my learned brethren, and were it not for the importance of the case, and for the fact that I am to some extent differing from the decision of the learned Vice-Chancellor, I should probably have contented myself with expressing my simple concurrence. It is, however, proper that I should make a few observations, and in doing so I will follow the line which has been adopted by Lord Justice *Bowen*, and I will first consider the point which has been raised by the appeal of those Defendants against whom an injunction was sought on the ground of their user of the machine. Their case, which was successful before the Vice-Chancellor, may be stated in one or other of two ways. It may be placed on the equitable doctrine of acquiescence, or it may be placed on the legal doctrine of estoppel by conduct. It appears to me not very material to inquire which of those two modes of stating their case is the more proper, although they have urged them both before us. In the present case there is no evidence of mistake of their rights by the Defendants, there is no evidence of the knowledge on the Plaintiff's part of any mistake by the Defendants of their legal rights, and, further, I think that there is no evidence of any representation made either by conduct or by words to the Defendants by the Plaintiff of the character which was relied on, and which would be necessary to support either the equitable or the legal defence. It was urged that when the Plaintiff pressed upon these Defendants his machine as being better than *Bennis's* machine, he said to them in effect, "Try my machine, because it is the better, but ultimately buy whichever of the two machines is the better;" that if *Bennis's* was found to be the better, or supposed to be better than Defendants', he in effect urged upon the Defendants to buy *Bennis's* machine. In my judgment that is not the effect, meaning, or force of what the Plaintiff said. I think he put forward one strong commercial reason why he desired the Defendants to purchase his machine, viz. that it was the better of the two; but it appears to me that in saying that he did not intend to suggest that he abandoned any legal rights, that the Defendants had no right to suppose that he was abandoning any legal rights, and that there

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was no representation to the effect which the Defendants attribute to his words. I think, therefore, that the defence of those Defendants who used the machine, whether it be treated as a legal defence of estoppel, or as an equitable defence of acquiescence, entirely fails. The ingredients necessary to each of those defences are wanting.

Now with regard to what may be called the larger question in this case, viz. that with regard to the patent and the infringement of it. I hope I can express my views in very few words. One inquiry which was rather incidentally hinted at than formally discussed, was whether there was any prior publication of an invention which was substantially the same as the Plaintiff's, and the two which our attention was drawn to were *Stanley's* and *Church's*. Let me say, in the first place, that the pith and substance of the Plaintiff's invention is in my judgment putting coals upon a fire by an intermittent radial action, an invention which, it may be remarked, reproduces with great exactitude the action of the human arm in placing coals upon a fire. [His Lordship then briefly considered the patent of *Stanley*, and shewed that the operation of *Stanley's* machine was quite different from that of the Plaintiff's.] With regard to *Church*, it is hardly seriously contended that it was in any respect similar for the present purposes, because there the coal was put on by a simple longitudinal thrust, the pusher being worked by an arm. It appears to me also to be plain that the longitudinal thrust was the essence of *Bennis's* invention and patent, and I certainly have come to the conclusion that it is not a mere matter of ordinary practice, which any ordinary workman would have given effect to, to pass from the longitudinal thrust of *Bennis's* machine to the radial action of the Plaintiff's machine. It is true that Dr. *Hopkinson* expressed his opinion that an ordinary workman would have passed from the one to the other. We have, as Lord Justice *Cotton* has already pointed out in this case, the remarkable circumstance that Mr. *Bennis* having attempted the radial action, threw it aside as not being successful, rejected it as an idle variation from his own plan. I rather doubt, I confess, whether Dr. *Hopkinson's* evidence is admissible upon the point of what would be done by an ordinary workman. Nobody suggests that Dr. *Hopkinson* is an ordinary workman; and his judgment of what an ordinary workman would do seems to me something like the opinion of the Lord Chancellor as to what any ordinary person would understand to be the law of the land on a particular point. I think, therefore, that there is no evidence before us from which we could come to the conclusion that any ordinary workman would have passed from the one to the other.

The question of infringement no doubt is one of some difficulty in the present case from the great peculiarity of the language in which the Plaintiff has made his claim. He has described the machine, he has indicated its parts by letters, and he has said that what he claims is not the hopper, nor the spiked rollers, nor the shafts and worms for operating the same, but he says, "What I do claim is the employment of the tappets G G, and shafts E E, and springs H, when applied to and in connection with the doors D D, as and for the purpose herein fully described and illustrated." It was said with force that the language used is very particularly that the Plaintiff claims these four elements, the tappets, the shafts, the springs, and the doors, that he claims them by reference to the figures, and describes them by the letters which in those figures indicate the respective parts. But I think the main inquiry which we have to answer before determining the true construction of that claim is this—Was this a combination for an old object, or was it a combination for a new object? It appears to me that the cases and the reason of the case draw a broad distinction between combinations which are old as regards their elements and old as regards the object to be attained, and combinations which though old as regards the elements are new as regards the mode of putting them together, and new as regards the object to be attained. I think that a comparison of what was said in *Curtis* v. *Platt* (1), where a broad distinction was drawn by Lord *Hatherley* between old and new objects, with what was said by Lord *Cairns* in the case of *Clark* v. *Adie* (2), in indicating the second mode in which the combination might be infringed in that case, and with what was said by the present Master of the Rolls in the case of *Nordenfelt* v. *Gardner* (3), goes to shew that there is a broad line of distinction to be drawn between cases of combination for an old object and cases of combination for a new object, and, as I have already said, reason as I think goes along with those authorities. Was then the object in the present case an old one, or was it a new one? Putting fuel upon a fire is of course an act, if not as old as *Adam*, I suppose as old as the time when *Tubal Cain* wrought in metal, or when *Prometheus* introduced fire to mankind. It is therefore as old as it can be. But is that the real object of the patent? I think that the real object of the patent is this, the automatic placing of coal on a fire by intermittent radial action. That object is new. I think, therefore, we are bound to construe this combination as a combination to effect a new and useful object. That being so, what was stated by Lord *Cairns* in the case to which I have already referred of *Clark* v. *Adie* (1) distinctly applies. He there said (2) this: "The second mode," that is to say, the second mode in which a combination might be infringed "would be one which might occasion more difficulty. The infringer might not take the whole of the instrument here described, but he might take a certain number of parts of the instrument described; he might make an instrument which in many respects would resemble the patented instrument, but would not resemble it in all its parts. And there the question would be, either for a jury or for any tribunal which was judging of the facts of the case, whether that which was done by the alleged infringer amounted to a colourable departure from the instrument patented, and whether in what he had done he had not really taken and adopted the substance of the instrument patented." That appears to me to be the inquiry in the present case. In the present case we have these broad features of likeness, that in both machines the motion is a radial motion, in both machines it is an intermittent motion, in both machines it is of course produced by means of a radius, in both machines that radius is moved in one direction by tappets, and the same radius is moved in the opposite direction by a spring. All those broad features of the machines are in common, but there is this difference, that in the Plaintiff's machine a shaft is impelled by the tappets and by the spring, whereas in the Defen-

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(1) 3 Ch. D. 135, n.; 35 L. J. (Ch.) 852.
(2) 2 App. Cas. 315, 320.
(3) 1 Rep. Pat. Cas. 65.

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(1) 2 App. Cas. 315. (2) 2 App. Cas. 320.

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dant's machine the radius itself is impelled by the tappets and the spring. It follows that the radius in the Plaintiff's is attached to the shaft, whereas the radius in the Defendant's works on a pin. That is the broad distinction between them. The result however appears to me to be substantially the same; by substituting the pin for the shaft as the centre on which the radius acts, and, by impelling the radius itself instead of impelling the shaft fixed to the radius, you have produced in substance precisely the same radial action by the same means. You drive your radius in one direction by tappets, and you drive it in the other direction by the spring, and you produce the same result, namely, the feeding of coal by a radial motion made intermittent in one direction by the operation of the tappets, and in the other direction by the spring. I think, therefore, that we have a new combination for a new object, and that the gist of that combination has been taken by the Defendant and that consequently there is an infringement.

For these reasons I entirely agree with the conclusion arrived at by my learned brethren.

Solicitors for Plaintiff: *Shaw & Tremellen*, agents for *A. Macdonald Blair, Manchester.*

Solicitor for *Bennis: Stringer, Manchester.*

Solicitors for *Crosses & Winkworth: Johnston, Harrison, & Powell*, agents for *T. H. Winder, Bolton.*

Solicitors for *Greenhalgh & Shaw: Chester & Co.*, agents for *A. W. Read, Manchester.*

H. C. J.

KURTZ *v.* SPENCE.

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Patent—Action for Injunction against Threats—Validity of Defendants' Patent —Amendment—Delay—Patents, Designs, and Trade Marks Act, 1883 (46 *&* 47 *Vict.* c. 57), s. 32.

In an action under sect. 32 of the *Patents Act* of 1883 to restrain a patentee from issuing threats, the Plaintiffs in their statement of claim alleged that the Defendants' patent was invalid. *Chitty*, J., ordered this allegation to be struck out (1), being of opinion that the validity of the Defendants' patent could not be tried in such an action. After nearly a year, the time for appealing against that order having long expired, the Plaintiffs applied to *Kekewich*, J., to whom the action had been transferred, for liberty to amend the statement of claim by inserting an allegation that the Defendants' patent was invalid. *Kekewich*, J., refused the application, and the Plaintiffs appealed:—

Held, by *Cotton* and *Bowen*, L.JJ., that liberty to amend ought to be given but upon special terms, in order that the Defendants might not suffer any loss by the Plaintiffs not having taken the proper course of appealing in due time from the order of *Chitty*, J. *Dissentiente*, *Fry*, L.J., who was of opinion that though, having regard to the opinion expressed in *Challender* v. *Royle* (2), the amendment was in itself proper, it was not competent to the Court to allow it, when doing so was inconsistent with and substantially reversed an order of *Chitty*, J., which was not liable to be appealed from.

THE Defendants were owners of a chemical patent known as *Spence's* patent, dated the 11th of August, 1882. The Plaintiffs were owners of a chemical patent dated the 12th of August, 1882, known as *Kynaston's* patent. The Defendants having threatened proceedings on the ground that *Kynaston's* invention was an infringement of *Spence's* patent, the Plaintiffs commenced this action under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883, to restrain such threats. The 6th paragraph of the statement of claim, after alleging that the two inventions were quite different, and that the use of *Kynaston's* invention was no infringement of *Spence's* patent, proceeded "moreover the said *Spence's* patent is invalid." The Defendants took out a summons to expunge those words. The summons was adjourned into Court, and on the 12th of August, 1886, Mr. Justice *Chitty* made an order for striking out those words, which were struck out accordingly (1).

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(1) 33 Ch. D. 579.

(2) *Ante*, p. 425.

The action proceeded, and was set down for hearing before Mr. Justice *Kekewich.* On the 21st of July, 1887, Lords Justices *Cotton* and *Bowen* in *Challender* v. *Royle* (2) expressed an opinion that the validity of the defendant's patent could be questioned in an action of this nature. The Plaintiffs then applied to Mr. Justice *Kekewich*, to whose Court the action had been transferred, for leave to amend their statement of claim by inserting an allegation that *Spence's* patent was invalid. The application was refused. The Plaintiffs then applied for leave to appeal from the order of Mr. Justice *Chitty*, notwithstanding the lapse of time, and also appealed against the refusal of Mr. Justice *Kekewich.* Both the application and the appeal came into the paper on the 3rd of August, 1887.

Moulton, Q.C., and *Lawson*, for the application for leave to appeal from Mr. Justice *Chitty.*

Aston, Q.C., and *Chadwyck Healey*, for the Defendants.

THE COURT (*Cotton*, *Bowen*, and *Fry*, L.JJ.) refused the application, no reason being given why the appeal was not brought in due time. Their Lordships, however, gave the Plaintiffs their option of having the action dismissed without prejudice to any new action for the same purpose.

The appeal from Mr. Justice *Kekewich* then came on.

Moulton, Q.C., and *Lawson*, for the Appellants :—

The pleadings stand as altered by the order of Mr. Justice *Chitty.* They have it is true been brought into their present state by an order of the Court, but Order XXVIII., r. 1, is quite general, and allows the pleadings to be amended in any circumstances; moreover it directs that all such amendments shall be made as are necessary for determining the questions between the parties. Where the pleadings do not provide for trying the

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(1) 33 Ch. D. 579.

(2) *Ante*, p. 425.

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questions, an amendment will be allowed even at the trial: *Tildesley* v. *Harper* (1). In the present case the validity of the Defendants' patent is a question in issue between the parties: *Challender* v. *Royle* (2); and the amendment ought to be allowed.

Aston, Q.C., and *Chadwyck Healey*, for the Defendants:—

Leave to amend ought to be refused on the ground that the statement of claim does not allege any such threats as would bring the case within the 32nd section, and that this is an attempt to get behind the order of the 12th of August, 1886, and substantially discharge it, although it has been held not to be subject to appeal. An order of this kind on a matter of pleading ought, when not appealed from, to be considered as regulating the proceedings in the suit.

Moulton, in reply.

1887. Aug. 5. COTTON, L.J.:—

This is an appeal from a refusal of Mr. Justice *Kekewich* to give the Plaintiffs liberty to introduce by amendment into their statement of claim words which would enable them to contest the validity of the patent claimed by the Defendants. The action is brought under the 32nd section of the *Patents, Designs, and Trade Marks Act*, 1883, which enables any one who is threatened with proceedings if he uses a certain invention, to proceed by action to restrain the issue of such threats. In order to establish his claim he must shew that what he is doing is not an infringement of any legal right of the defendant. Mr. Justice *Chitty*, on the 12th of August last year, struck out from the statement of claim seven words which had been introduced by the pleader questioning the validity of the Defendants' patent, and in consequence of the opinion lately expressed by this Court in *Challender* v. *Royle* the Plaintiffs moved before Mr. Justice *Kekewich*, for liberty to amend their statement of claim by introducing an allegation that the Defendants' patent is invalid. They did so, under Order XXVIII., rule 1, which says that "the Court or a Judge may, at any stage of the proceedings allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

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(1) 10 Ch. D. 393.

(2) *Ante*, p. 425.

Now, I do not in any way vary or depart from the opinion I have previously expressed. The point did not come before us in such a form that we could finally decide it, but after that expression of opinion by the Court of Appeal it is certainly a real question between the Plaintiffs and the Defendants here to be tried in the action, whether the Plaintiffs can successfully impeach the patent on which the Defendants are relying, and which they say the Plaintiffs are infringing. I do not go at all into any of the questions introduced by Mr. *Aston* as to whether the threats were such threats as would come within the section, and various other matters, but I will only deal with the question whether this is one of the real questions to be decided between the parties. If I thought that that point could not be raised in this action, I should say that was a ground for not allowing the amendment, but assuming that it can be raised in such an action as this, what then is to be done? If it had not been that a year ago Mr. Justice *Chitty* made an order preventing the Plaintiffs from raising this question, and the Plaintiffs acquiesced in that order for nearly a year, I think the Court, taking the view which I and Lord Justice *Bowen* expressed, though we had not to decide it, would say that it is right, having regard to the terms of this rule, that the matter should be introduced so as to allow the question to be decided between the parties. There was an original motion before us on Wednesday for leave to appeal, notwithstanding the time which had elapsed since Mr. Justice *Chitty's* order of the 12th of August, 1886. We refused that application, and I have no doubt that we were right. No reason was shewn for the delay in appealing, except that the parties did not then sufficiently consider what the law was, or were afraid to try the appeal, which of course is not a good reason. The case now before us is different. When by an amendment the real substantial question can be raised between the parties, ought we to refuse to allow the amendment, having regard to the rule, and to the direction in the *Judicature Act* that as far as possible in any proceeding all questions between the parties shall be decided so as to prevent multiplicity of actions?

I have come to the conclusion, and Lord Justice *Bowen* agrees with me, that it would be better (if we can do it without injustice to the Defendants) to allow that amendment to be introduced, rather than to leave the Plaintiffs to the liberty which we gave them on the application for leave to appeal, of having the action dismissed without prejudice to their right to bring another action. But we ought to see that the Defendants do not suffer any loss or expense, and we ought also to see that they are not prejudiced in the way of trying the question of the validity of the patent. They ought, therefore, to have the same notice of the objections to be taken, and the same right of beginning and replying, as they would have had if they had brought an action against the Plaintiffs to restrain the violation of their patent. I do not see that the Defendants can be prejudiced by our allowing this amendment, if we give them the costs which have been incurred and wasted, and also give them such rights of knowing what the objections are, and of beginning and replying, as they would have if an action had been brought by them for violation of their patent. Therefore we think it the right course to give the Plaintiffs liberty, on or before Tuesday next, to introduce by way of amendment in their statement of claim an allegation that *Spence's* patent is invalid on the grounds to be mentioned in our order—the Plaintiffs undertaking to allow the Defendants on the question of validity of the patent to begin and to have a reply. Then, which I think is the only way of saving the Defendants from any expenses which they ought not to bear, we add this: "And order the Plaintiffs, if they so amend, to pay to the Defendants their costs as between solicitor and client of this application, and all costs incurred by the Defendants and thrown away in consequence of the amendment hereby authorized not having been made on the day after Mr. Justice *Chitty's* order of the 12th of August, 1886, including the costs, if any, caused by any adjournment of the action rendered necessary by reason of the amendment being made or authorized." We do not make the order for payment of the costs as between solicitor and client as an adverse order between litigants, but we impose such payment as a term on which we give the Plaintiffs the liberty to amend, so as to shew that we very much discourage a party's waiting, as these Plaintiffs have done, for such a length of time, before bringing to the Court of Appeal the question whether they are at liberty to introduce such an amendment. If the Plaintiffs do not avail themselves of this liberty to amend, the only order will be that the appeal motion will be refused with costs, those costs being costs to be taxed as between party and party in the ordinary way.

Bowen, L.J.:—

I am of the same opinion.

Fry, L.J.:—

I think that my learned brethren are too indulgent to the Applicants. I do not for a moment doubt, after their previous expression of opinion, that the question which is to be raised by this amendment is one which would have been proper to have been decided in the action if it had been properly raised; but it is to be borne in mind that in this case there is a subsisting order dealing with this particular point of pleading. That order was made more than a twelvemonth ago, and we have held that order not to be the subject of appeal, for although a new view of the law may have been expressed no new matter has arisen. Under these circumstances I do not think it competent to the Court to make an amendment inconsistent with and reversing that order.

I further think that it is in the interests of litigants that there should be some finality in orders of this description; and where an order has been made, and is no longer subject to appeal, dealing with the mode of conducting the case, I think that it is right that that decision should be final as between the litigants in that action, and that, therefore, we have done the utmost to which the Applicants are entitled, in giving them leave to bring another action free from any prejudicial effect of their not having raised the point in this action. The fact that in this very case we had before us in the paper two days ago two applications in the same action about the same amendment of

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pleadings, is an illustration of the multiplicity of applications to which this, as I think, laxity of practice is likely to lead. I think, further, although the whole policy of the *Judicature Act* and of the Rules requires the Court to allow all proper amendments to be made to raise the real question between the parties, yet that it is possible for a plaintiff by his want of care, by his delay, and by his negligence, to deprive himself of the right of further harassing a defendant by new amendments.

I have one other objection to the order, which is this. I think it is more subtle than the nature of things allows usefully to be made; and I am apprehensive that orders of such extreme complexity will only lead to further difficulties in litigation. For these reasons, I need not say unwillingly, I differ from the conclusion of my learned brethen.

Some discussion then took place as to the form of the order, and it was settled that it should be prefaced by a statement that the Plaintiffs' counsel not wishing to exercise the liberty given by the order of the 3rd of August to dismiss their action without prejudice to a new action for the same purpose, the Plaintiffs should be at liberty to amend their statement of claim on or before the 9th of August by inserting an allegation that *Spence's* patent was invalid on the grounds stated in the particulars of objections to be delivered with the amended statement of claim, the Plaintiffs undertaking to allow the Defendants, on the question of the validity of the patent, to begin and have a reply.

Solicitors for Plaintiffs: *C. P. Pritchard & Marshall*, agents for *G. R. Rogerson & Co., Liverpool.*

Solicitors for Defendants: *Jaques & Co.*

H. C. J.

WALKER *v.* GENERAL MUTUAL BUILDING SOCIETY.

[1887 W. 2023.]

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NORTH, J.
July 8.
C. A.
Aug. 10.

Benefit Building Society—Withdrawing Member—Reference of Disputes to Arbitration—37 *&* 38 *Vict. c.* 42, *s.* 34 [*Revised Ed. Statutes, vol. xvii., p.* 216]—47 *&* 48 *Vict. c.* 41.

By one of the rules of a benefit building society formed under the Act of 1874 it was provided that a member might by notice in writing withdraw, and should be entitled, "provided there shall be sufficient funds available," to receive within one month after the notice, or earlier if the board should think fit, the subscriptions he had paid on his shares. Another rule provided that the board should have power to determine all matters of dispute between the society and any member or person claiming on account of any member, and that if the party should be dissatisfied with their decision, the matter should be referred to arbitration. A member gave notice to withdraw. The society declined to pay his subscriptions at the end of the month on the ground that they had not sufficient funds in hand; the member contended that they had:—

Held (affirming the decision of *North,* J.), that though the retired member might be in some sense a creditor, he was still so far a member as to be bound by the rules, and that the dispute must be referred to arbitration.

Armitage v. *Walker* (1) and *Wright* v. *Deeley* (2) approved.

THE society was founded in 1869, and was incorporated in December, 1874, under the Act 37 & 38 Vict. c. 42.

By the rules of the society there were two classes of shares—fully paid-up shares and subscription shares. The subscription shares were to be paid up by monthly payments.

Rule 33. "Members whose shares have been in existence twelve months may withdraw them by giving notice in writing to the secretary, and shall be entitled (provided there shall be sufficient funds available) within one month after such notice, or earlier if the board think fit, to receive all the subscription moneys paid on account of such shares, together with such interest as the board shall determine; but no member holding

(1) 2 K. & J. 211.

(2) 4 H. & C. 209.

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subscription shares shall be entitled to claim interest if the shares are withdrawn within twelve months after their issue."

34. "Shares under notice of withdrawal shall be paid in rotation, shares of deceased members in all cases taking the priority."

78. "The board shall have power to determine all matters of dispute arising between the society and any member or person claiming on account of any member, and if the party shall be dissatisfied with their decision, or shall refuse to abide thereby, the matter shall be referred to three of the arbitrators of the society."

The Plaintiff was the holder of three fully paid-up shares of £50, £25, and £25, the certificates of which were dated the 1st of December, 1883, and the 15th of February, 1877, and of one subscription share on which he had paid up £28 5*s.*

On the 4th of April, 1887, the Plaintiff gave notice to the secretary of his desire to retire from membership, and asked payment of £128 5*s.*

The secretary replied that he was not able to make this payment, as notices were to be paid in rotation, and there were many notices of withdrawal preceding that of the Plaintiff.

The Plaintiff thereupon commenced this action "both in his own individual right as a creditor of the defendant society and also on behalf of himself and all other the persons late members of the defendant society, who, on or before the 4th of April, 1887, gave notice of withdrawal from the defendant society," asking for a declaration that the moneys in possession of the society ought to be applied in paying to the late members of the society who had given notice of withdrawal the amounts due to them respectively in rotation, according to the priority of their notices; for an injunction to restrain the society from paying the moneys of the society to such persons except in rotation according to the priority of their notices; and for a receiver of the assets of the society available for payment to such persons of the amounts remaining due to them respectively.

The Plaintiff gave notice of motion for a receiver, or in the alternative for an injunction, in the terms given above. The motion came on before Mr. Justice *North* on the 8th of July, and the society took the preliminary objection that the Court had no jurisdiction, as the dispute ought to be referred to arbitration. (1)

Cozens-Hardy, Q.C., and *Micklem*, for the Defendant society:—

The jurisdiction of the Court is ousted by sect. 34 of the *Building Societies Act*, 1874, and the rule of the society as to arbitration: *Hack* v. *London Provident Building Society* (2); *Municipal Permanent Investment Building Society* v. *Kent* (3). These cases, no doubt, referred to mortgage actions, which have since been excepted by statute 37 & 38 Vict. c. 42, from the arbitration clause, but the principle of the cases remains in force.

The fact that the Plaintiff has given notice of withdrawal does not make him cease to be bound by the rules, the disputes in question arise from his past position as member; by becoming a member he submitted to be bound by these rules. Even if it can be said he is not a member he is certainly claiming on account of his former position as member. In *Huckle* v. *Wilson* (4) it was held, under the Act then in force, that a withdrawing member was bound by a rule requiring disputes to be referred to arbitration, and the existence of such rule was presumed. Again

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(1) 37 & 38 Vict. c. 42, s. 34: "Where the rules of a society under this Act direct disputes to be referred to arbitration, arbitrators shall be named and elected in the manner such rules provide, or, if there be no such provision" [here follow directions as to the mode of appointment]; "and whatever award shall be made by the arbitrators or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute." . . . .

47 & 48 Vict. c. 41, s. 2: "The word 'disputes' in the *Building Societies Acts*, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided; and, in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled." . . . .

(2) 23 Ch. D. 103.

(3) 9 App. Cas. 260.

(4) 2 C. P. D. 410.

Walton v. *Edge* (1) shews that a withdrawing member is not in the position of a stranger who is creditor.

Napier Higgins, Q.C., and *A. N. Cumming*, for the Plaintiff:—

As between himself and the society a withdrawing member becomes by the fact of his withdrawal in the position of a stranger and not subject to the rules: *Auld* v. *Glasgow Working Men's Building Society* (2); *Brownlie* v. *Russell* (3). His remedy is therefore in the ordinary Courts.

[NORTH, J.:—I feel a difficulty that there is no application on the part of the Defendants to stay proceedings.]

Higgins:—The Plaintiff does not wish to create unnecessary expense or to raise a mere technical difficulty, and is willing to treat the matter as if such application had been made.

NORTH, J.:—

I think the right way to deal with the matter is to deal with it as if an application had been made to stay all further proceedings.

The Plaintiff comes here and asks to have everything done by the society on the footing of the unaltered rules. He says he is a creditor of the society because he has given proper notice of withdrawal. The society object that there is no jurisdiction to determine the question raised by the Plaintiff because the dispute is one which cannot be decided by this Court, but must be dealt with in one of the ways provided by the Act of Parliament taken with the rules of this society. No doubt the Plaintiff is what may be called a creditor; I say creditor because I bear in mind Lord *Blackburn's* remarks in *Walton* v. *Edge*. The dispute is one which arises about the relationship between the Plaintiff and the society arising from his having been a member. Now the rules made under the Act provide for the determination by arbitration of "all matters of dispute arising between the society and any member or person claiming on account of any member," and it is clear that the Plaintiff is claiming as a member or on account of his position of having been a member. Where there is a rule such as there is here the parties must have the dispute referred to arbitration. The case is undistinguishable from that of *Municipal Permanent Investment Building Society* v. *Kent* (1), and the earlier case of *Hack* v. *London Provident Building Society* (2). Under these circumstances I think the dispute, which may be a serious and important one between the Plaintiff and the society, is one in which I have no jurisdiction. As the parties have conceded that it may be treated as if there had been an application to stay proceedings by the Defendants, I make an order for such stay of proceedings.

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(1) 10 App. Cas. 33.

(2) 12 App. Cas. 197.

(3) 8 App. Cas. 235.

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The motion was refused, and the parties consenting to treat the matter as if a summons to stay proceedings had been taken out, an order was made staying all proceedings in the action. The Plaintiff appealed, and the appeal was heard on the 10th of August, 1887.

A. N. Cumming, for the appeal:—

Mr. Justice *North* held that the Plaintiff was a member, that he came within the provisions as to arbitration, and that the Court had no jurisdiction. I submit that neither the Act nor the rules of the society cover the Plaintiff's case, and that the general jurisdiction of the Court is therefore not excluded. The statute bearing on the case is 37 & 38 Vict. c. 42: see sect. 32, sub-sect. 4; sect. 16, sub-sect. 9; sects. 34, 35, 36. The rule of the society as to arbitration is rule 78. I submit that it does not apply, for that it only applies to internal disputes between the society and its members. This is not an internal dispute: the Plaintiff has retired, he therefore is not a member, and he has not been paid, so that he is in the position of a creditor. We say that there are funds available if the society were now wound up. Mr. Justice *North* relied on *Hack* v. *London Provident Building Society* and *Municipal Permanent Investment Building Society* v. *Kent*. In consequence of these decisions the Act 47 & 48 Vict. c. 41, was passed which provided that disputes on mortgages should not be referred to arbitration. The effect of

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this statute was discussed in *Western Suburban and Notting Hill Building Society* v. *Martin* (1), and it was held that the arbitration clauses have reference only to disputes between the society and members in their capacity of members. *Morrison* v. *Glover* (2) was to the same effect. Now the Plaintiff is not a member. A retired member has the rights of a creditor: *Re Midland Counties Benefit Building Society* (3); *In re Queen's Benefit Building Society* (4); *In re London Permanent Benefit Building Society* (5). It was held in *In re Doncaster Permanent Building Society* (6) that advanced shareholders who had redeemed their mortgages were not liable to contribute, for that they were not members. *In re Planet Benefit Building Society* (7) is an authority in my favour. It was held in *Fleming* v. *Self* (8) that the arbitration rules do not apply in a suit by a member of the society for redemption.

[COTTON, L.J.:—The question appears to be, not whether the Plaintiff is in some sense a creditor, but whether he is so far a member as to be bound by the rules. Are not *Armitage* v. *Walker* (9) and *Wright* v. *Deeley* (10) against you?]

Those cases were substantially overruled by *Auld* v. *Glasgow Working Men's Building Society* (11), which shews a withdrawing member to be a creditor outside the rules.

[*Cozens-Hardy*, Q.C.:—*Wright* v. *Deeley* was approved in *Huckle* v. *Wilson* (12).]

I contend that under the *Judicature Act*, 1873, s. 25, sub-s. 8, the Court has jurisdiction.

Cozens-Hardy, Q.C., and *Micklem*, for the Respondents, were not called upon.

COTTON, L.J.:—

The only question we have to consider in this case is whether it is governed by the rules of the society and the Acts with regard to reference to arbitration. The 78th rule of the society is in these

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(1) 17 Q. B. D. 609.
(2) 4 Ex. 430.
(3) 13 W. R. 399.
(4) Law Rep. 6 Ch. 815.
(5) 17 W. R. 513.
(6) Law Rep. 3 Eq. 158.
(7) Law Rep. 14 Eq. 441.
(8) Kay, 518; 3 D. M. & G. 997, 1030.
(9) 2 K. & J. 211.
(10) 4 H. & C. 209.
(11) 12 App. Cas. 197.
(12) 2 C. P. D. 410.

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terms: "The board shall have power to determine all matters of dispute arising between the society and any member or person claiming on account of any member, and if the party shall be dissatisfied with their decision, or shall refuse to abide thereby, the matter shall be referred to three of the arbitrators of the society." The Plaintiff has brought his action seeking to get an injunction and a receiver, and to get judgment for a sum of £128. He claims this relief on the ground that he was a member of the society, and that he, having taken shares under rule 33, gave notice to withdraw, which, under that rule, gave him this right, that he "shall be entitled (provided there shall be sufficient funds available) within one month after such notice, or earlier if the board think fit, to receive all the subscription moneys paid on account of such shares, together with such interest as the board shall determine; but no member holding subscription shares shall be entitled to claim interest if the shares are withdrawn within twelve months after their issue." The contention was that the arbitration clause only applied to internal disputes. Now "internal" is a rather unfortunate expression. In my opinion it applies to all disputes between members and the society with reference to the true construction and effect of the rules of the society, and if so, this is an internal dispute. The case, as I understand it, is this. There are a number of persons who have given notice of withdrawal: this gentleman has done so, and the directors say that there are not funds available to provide for the payment to him, and it is only when there are funds available that the contract into which he has entered gives him any right to be paid. The question, therefore, to be determined is whether there are properly within the meaning of these rules funds available for the purpose of paying this gentleman. He, however, says: "Rule 78 does not apply to me, I am no longer a member, I am a creditor." But the question is not whether in some sense he is a creditor, but whether, if and so far as he is a creditor, he is bound *quâ* member by the rules of the society, and therefore, by the rule under which disputes between the society and its members are to be referred to arbitration.

In support of the Appellant's contention that he stands in the position of a creditor, a number of cases were gone through with great diligence in which persons in the same position as the present Plaintiff have been referred to as creditors, and in one particular case as creditor-shareholders. I am of opinion that when the Judges in these cases used the expression "creditor" or "creditor-shareholders," they did not mean to say that a person so claiming was claiming irrespective of his position as a member, but only that being a member he was entitled to stand in a position of preference to other members who had not given notice to withdraw. That appears, I think, even by one of the cases on which the Appellant relies: *In re Planet Benefit Building Society* (1). But there are cases exactly in point on the present question. In *Armitage* v. *Walker* (2) a person in exactly the same position as the present Plaintiff was held bound by the rules to refer disputes between him and the society to arbitration. It is contended that that decision has been practically overruled by later decisions, but the only later decision really relied upon was *Auld* v. *Glasgow Working Men's Building Society* (3), which was said to establish this proposition, that the plaintiff, having given notice to withdraw, was a creditor outside the rules of the society. That case decided nothing of the kind. The plaintiff, as a member, had entered into a contract with the society, and certain members of the society, the majority at a meeting, had tried to alter the contract into which he as a member had entered with the society. It was held that he was not bound by that; and that, therefore, as a member, he was entitled to insist upon his rights under the contract originally entered into by him with the society; but it is in no way laid down that he was to be treated not as a member but as a creditor. Then there is the case of *Wright* v. *Deeley* (4), where apparently the very point in this case was decided, and in my opinion rightly decided. We cannot go minutely looking at what is the dispute in the particular case. We must see what is the effect of this rule, that all disputes between members and the society and the board shall, if not settled by the board to the satisfaction of the member, be referred to arbitration. Here, in my opinion, notwithstanding the notice which has been given, which enables the Plaintiff to stand in a preferential position, his claim is still *quâ* member, depending upon his rights as member, and not upon rights belonging to him as an outside creditor. The distinction was drawn in several of the cases between the position of these creditor-shareholders and real creditors, and it was held that, though they were in a position of preference as against other members of the society, they were not creditors in the sense of making a claim independent of the rules of the society. I am of opinion, therefore, that this objection prevails, and that the appeal must be dismissed.

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(1) Law Rep. 14 Eq. 441.
(2) 2 K. & J. 211.
(3) 12 App. Cas. 197.
(4) 4 H. & C. 209.

BOWEN, L.J.:—

I am of the same opinion. I think that we are really bound by the decisions to which the Lord Justice has referred, and for this reason, that those decisions have been accepted by the Courts, and subsequent legislation has gone upon the assumption that the interpretation so put upon the law by the Courts would continue to prevail. Under those circumstances the Court of Appeal is always extremely reluctant to interfere, for if we did so we should be really altering legislation, or, at all events, altering the assumption upon which the Legislature has acted. I do not at all intimate that I differ from those cases, on the contrary, I have no reason to doubt that they were rightly decided; but I think it is enough for me to say that they have been decided, and we should only get into difficulties by discussing the abstract question whether a person claiming as the present Plaintiff does is a creditor or not. The right way is to go to the rules and Acts of Parliament, and to consider whether the person is a member within the meaning of the rule if it is a rule that is in question, and if there is an Act of Parliament to consider whether he is a member within the meaning of that Act of Parliament. If we go beyond that, and begin discussing the abstract problem whether he is a creditor or not, we are necessarily driven into the embarrassment of using terms like those which have been cited to us, *quasi* creditor or *quasi* member, the meaning of which it is certainly impossible perfectly to appreciate, and from the use of which no legal deduction can ever be satisfactorily drawn.

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FRY, L.J. :—

I am of the same opinion. There are two questions to be considered. First, is this dispute which has arisen between the Plaintiff and the society, a dispute arising between the society and a "member or a person claiming on account of a member," within the meaning of the 78th rule of the society? I do not think that the Plaintiff has ceased to be a member, because he has given notice; but if he have, he, at any rate, is a person claiming on account of a member, because his sole claim is to receive back payments made by himself in the character of member. Then the other inquiry is this. In the Act of 1884, amending the previous statute of 1874, it is provided that the rule with regard to arbitration should apply only to disputes between the society and members in their capacity of members of the society. Now, is this a dispute between the society and the Plaintiff in his capacity of member? I have no hesitation in saying that in my judgment it is. His rights arise entirely from his membership, he is a withdrawing member, and till he has received payment it appears to me he remains a member. Rule 10 treats the person who has given notice as a member, and in my judgment rightly treats him as a member. I think, therefore, that this dispute is one which cannot be made the subject of litigation until it has been the subject of arbitration. And I will make this one further observation. I had a little doubt at one time whether it would not be right to make the stay until further order, not that I have any conception that the Plaintiff ever will have any rights of litigation in this matter, but because it did not appear to me necessary to decide whether such rights can arise. But I think that as he has no present right against the society, the learned Judge was right in staying execution absolutely, which stay will not, I apprehend, preclude him from litigating any rights that he may afterwards acquire against the society. I think, therefore, the appeal must be dismissed with the usual results.

Solicitors for Plaintiff: *Evans & Batchelor.*

Solicitors for Defendants: *Flint & Gardner.*

H. C. J.

LEEDS ESTATE, BUILDING AND INVESTMENT COMPANY *v.* SHEPHERD.

[1885 L. 119.]

STIRLING, J.
1887
July 6, 7, 12, 13, 20; *Aug.* 9.

Company—Winding-up—Directors—Auditor—Payment of Dividends out of Capital—Misfeasance—Delusive Balance-Sheets—Estimated Profits—Duties and Liability of Auditor.

The articles of association of a limited company, formed in 1869 for the purpose of lending money on security, provided (1) that when the company should pay a dividend of 5 per cent. the directors should receive a fixed sum for each attendance, and a further fixed sum for every additional 1 per cent. of dividend; (2) that the directors might declare dividends upon such estimates of account as they might see proper to recommend, so that no dividend should be payable except out of profits; (3) that they should annually lay before the company a statement of the income and expenditure of the past year, and a balance-sheet containing a summary of the property and expenditure of the company; (4) that the accounts of the company should be examined every year with the vouchers relating thereto, and the correctness of the balance ascertained by an auditor who should make a report to the members on the balance-sheet and accounts stating whether in his opinion the balance-sheet was a full and fair balance-sheet, containing the particulars required by the articles, and properly drawn up so as to exhibit a correct view of the state of the company's affairs.

The company never made any annual profits except in one year when it made a profit of less than 5 per cent., but the directors in every year from 1870, when the company commenced business, declared and paid a dividend of 5 per cent. and upwards; and they remunerated themselves on the corresponding scale, and, under the authority of a resolution of the company, paid bonuses to the manager. Such payments were in fact made out of capital.

The balance-sheets on which the dividends were declared were prepared not by the directors, but by the manager. They were delusive, they over-estimated the assets of the company, and were framed with the object of shewing a profit available for a dividend. The auditor never looked at the articles of association but accepted the statements of the manager, and certified from time to time that the accounts submitted to him were true copies of those shewn in the books of the company. No proper statement of income and expenditure or auditor's report was ever laid before the company. The directors did not know the true state of the company's affairs or that the balance-sheets were delusive. They never exercised any judgment with reference to the accounts, but relied entirely on the manager and auditor:—

Held (1), that the directors had fallen short of the standard of care which they ought to have applied to the affairs of the company; and that the onus was upon them to shew that the dividends had been paid out of profits:—

Held (2), that upon the evidence they had failed to shew this, and that they were jointly and severally liable to make good all sums improperly paid out of capital in respect of dividends to the shareholders, directors' remuneration, and bonuses to the manager.

In re Oxford Benefit Building and Investment Society (1) followed.

Held (3), that it was the duty of the auditor in auditing the accounts of the company not to confine himself to verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles of association, and was properly drawn up so as to contain a true and correct representation of the state of the company's affairs; and

Held (4), that as the improper payments by the directors were the natural and immediate consequence of breach of duty on the part of the manager and the auditor, the manager and auditor were liable in damages to the amounts so paid, except, in the case of the auditor (who had pleaded the *Statute of Limitations*), so much thereof as was covered by the statute.

THIS was an action by a company now in liquidation against certain of the former directors, the representatives of a deceased director, the manager and secretary, and the auditor of the company, seeking to render them liable (amongst other things) for breach of duty in making payment of dividends out of capital and in receiving remuneration to which they were not entitled.

The company was formed in 1869 under the *Companies Act* of 1862, for the purpose, among other objects, of lending money on security.

Its articles of association provided:—

Art. 63. That when and so long as the company should pay a dividend of 5 per cent. per annum, each director present should receive 10*s.* for each weekly meeting of the board, and when and so long as a greater dividend should be paid, a further sum of 2*s.* 6*d.* for every additional 1 per cent. of dividend.

Art. 79. That the directors might with the sanction of the company in general meeting declare annual or half-yearly dividends "upon such estimates of accounts as the directors may see proper to recommend."

Art. 80. "No dividends shall be payable except out of the profits arising from the business of the company; but this clause

(1) 35 Ch. D. 502.

shall not prevent the declaration of a dividend upon any such estimate of account as aforesaid."

Art. 86. "The directors shall cause true accounts to be kept of the estate and property of the company, of the sums of money received and expended by the company, and the matter in respect of which such receipts and expenditure take place, and of the credits and liabilities of the company. . . ."

Art. 87. "Once at least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year or for the past half-year, made up to a date not more than one month before such meeting."

Art. 88. "The statement so made shall shew, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries, and other like matters. Every item of expenditure only chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting. . . ."

Art. 89. "A balance-sheet shall be made out in every year and laid before the company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to Table B of the *Companies Act*, 1862, or as near thereto as circumstances permit."

And arts. 98 to 101 inclusive were as follows:—

Art. 98. "Once at least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors."

Art. 99. "Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto."

Art. 100. "Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; he may at the reasonable expense of the company employ accountants and other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the company."

Art. 101. "The auditors shall make a report to the members on the balance-sheet and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view as to the state of the company's affairs, and, in case they have called for explanation or information from the directors, whether such explanation or information has been given by the directors, and whether it has been satisfactory; and such report shall be read together with the report of the directors at the ordinary meeting."

The capital of the company consisted of £200,000, divided into 40,000 shares of £5 each; and it carried on business from the year 1869 to the 31st of October, 1882. The business of the company consisted, to a very considerable extent, of lending money on mortgage, on the terms that the money lent, together with an addition representing interest, should be repaid by monthly instalments extending over a period of years; and one of the first transactions of the company was the advance of £600 on mortgage to secure £744 payable in six years by monthly instalments of £10 6*s.* 8*d.* Advances of this kind were termed "long loans."

The Defendant *Crabtree*, who had been formerly manager of a flax mill in *France*, was originally a director of the company; but in February, 1870, he was appointed secretary and manager of the company at a salary of £200 per annum, and in 1872 a resolution was passed that he should be paid a bonus of £25 in every year in which sufficient profits should be realized to enable the company to pay a dividend exceeding 5 per cent.

With the exception of the year 1876, when the company made a small profit of less than 5 per cent., no profit was ever earned by the company, and its business was carried on at a loss. Nevertheless the directors declared and, with the sanction of the shareholders given on the faith of the balance-sheets, paid in every year until the year 1882 dividends of between 5 and 10 per cent., and in the year 1882 a dividend of 2½ per cent.; they paid themselves the corresponding attendance fees, and they also paid bonuses to *Crabtree* as if profits had been duly realized according to the resolution.

The balance-sheets presented by the directors and laid before the shareholders in general meeting, were all prepared by *Crabtree*, and were all in the same form. They consisted of a "share account," a "cash account," a "stock account," and a "profit and loss account." The first was merely a statement as to the issued and unissued shares; the second was merely an account of receipts and payments in which capital and income were mixed up together; the third, which purported to shew the amount of "moneys lent," did not give the sum total of the advances made to borrowers, but included prospective interest in respect of "long loans" expected to be received by the company, taken at its full numerical value, although the payment of it was in fact spread over five or six years, and this account was in the view of the Court prepared solely with the view to shew a profit which did not exist; and the fourth was not a profit and loss account properly so called, but simply shewed the proposed mode of application of the balance appearing by the stock account; and in the view of the Court it must have been obvious to men of business that there was nowhere any such statement of income and expenditure as was required by the articles.

The balance-sheets for the years 1871 to 1874 contained similar items, and the amounts were arrived at in the same way. In the balance-sheet for 1874–5 an item of deferred interest was introduced, which did not however comprise the whole of the deferred or prospective interest, and from 1876 to 1880 the item of "deferred interest" fell out of the accounts, and in the item of "moneys lent" a deduction in respect of prospective interest was made, which however fell short of the full amount, and according to the evidence of the expert witnesses, was purely arbitrary. Beyond the deductions so made no allowance or provision was made for bad debts, losses, or contingencies, and all the securities of the company were taken as sufficient. It was admitted by *Crabtree* that in framing the stock account it was the practice first to take ascertained items on both sides, and then to calculate the amount required for a dividend, and to fill in the amount of moneys lent so as to make both sides balance. The balance-sheets so prepared were entered in the books and from them the accounts submitted to the shareholders were copied.

The accounts from 1870 to 1880 were audited by the Defendant *Locking*, who at the time of his original appointment was a clerk in a bank. For the performance of the duties of auditor he received at first a fee of five guineas, afterwards a fee of seven guineas, and ultimately a fee of twelve guineas. The form of certificate given by *Locking* was from 1874 to 1880 as follows:—

> "I certify that I have examined the above accounts and find them to be a true copy of those shewn in the books of the company."

In the year 1870 *Locking* gave a similar certificate with the following addition: "The vouchers and receipts correspond in all cases with the payments debited. I have gone carefully into the items as shewn in the stock account, and consider the dividend which it is proposed to declare a just and fair division."

In 1871 *Locking* wrote to the directors a letter with reference to the accounts of that year, containing the following passage: "Stock account; the making of this account devolves more particularly on yourselves and the manager than the auditors. At the same time the items were fully explained by Mr. *Crabtree*, and I do not consider the estimate overdrawn or likely to give any shareholder cause to object. Of course, it would have been better if the parties had agreed to divide nothing for a few years till a good accumulation had taken place, but a dividend is no doubt a necessity."

The company went into voluntary liquidation on the 31st of October, 1882. It was insolvent to a large extent, and this action was brought by the liquidator in the month of January, 1885, for the benefit of the creditors. The Defendants were *John Shepherd* and *John Scott*, who had been directors from the commencement of the company, the legal personal representatives of *Wm. Bilborough*, who had been a director throughout, but had died since the liquidation, *James Crabtree*, the secretary and manager, *J. B. Barry* who had been a director from May, 1875 to February, 1881, *G. H. Locking*, the auditor, and *W. Whitaker*, who was a director during a portion of the years 1881–1882.

By his statement of claim the Plaintiff sought (*inter alia*) a declaration that the Defendants were jointly and severally liable to make good sums amounting to £3394 18*s.* 10*d.* in respect of dividends paid out of capital, £540 2*s.* 6*d.* in respect of directors' fees, and £900 in respect of bonuses paid to *Crabtree*, so far as such sums were paid whilst the Defendants were officers of the company.

Locking, the auditor, by his defence pleaded as to part the *Statute of Limitations*, and this plea was allowed at the trial. Such additional facts and evidence as are necessary for the purposes of this report will be found in the judgment of his Lordship.

Sir *Horace Davey*, Q.C., *Buckley*, Q.C., and *W. Baker*, for the company:—

The case as against *Crabtree* is one of fraud, and is practically undefended. As to the directors they have clearly paid dividends out of capital, and to do so is *ultrà vires*, and beyond the legal powers either of the directors or of the company. It is a breach of trust which the shareholders could not sanction, and which the directors must make good: *In re Oxford Benefit Building and Investment Society* (1).

The balance-sheets were so prepared as to disguise the payment of dividends out of capital. There was no difficulty in framing balance-sheets such as ordinary men of business applying their minds to the work could not overcome without possessing actuarial knowledge.

Locking, the auditor, failed to perform his duties as defined by the articles of association; even if he had no actual knowledge that the balance-sheets were false. Had he performed his duties with ordinary diligence, these illegal payments could not have been made out of the capital of the company; and he is liable for the loss which is the direct consequence of his failure to perform the duties of his office: *Story* on Agency (2); *Mayne* on Damages (3).

Sir *Henry James*, Q.C., and *E. W. Byrne*, for the Defendant *Shepherd*:—

Directors are entitled to take and act upon the advice of

(1) 35 Ch. D. 502.
(2) 7th Ed. p. 217.
(3) 3rd Ed. p. 468.

skilled and competent persons, and they incur no liability in acting upon the advice so obtained, even if it should turn out to have been mistaken: *Rance's Case* (1); and they are not the less entitled to act on such advice because it is given by their own secretary and manager.

This is not a case in which, as in *In re Oxford Benefit Building Society* (2), the directors could only declare dividends out of realized profits, they were empowered to declare dividends upon such estimate of profits as they might see proper to recommend, and they were not bound themselves to possess skilled actuarial knowledge. So if they in good faith acted within their powers upon erroneous advice, they are not liable as upon a breach of trust unless they acted with gross negligence; and here they acted entirely on *Crabtree's* advice, and it is not shewn that they themselves had any knowledge of the real state of the company's affairs: *Grimwade* v. *Mutual Society* (3). *In re Oxford Benefit Building and Investment Society* is inconsistent with previous decisions: *Overend & Gurney Co.* v. *Gibb* (4); *Turquand* v. *Marshall* (5).

W. Pearson, Q.C., and *Swinfen Eady*, for *Scott*:—

The directors had no reason to suspect fraud on *Crabtree's* part, and no fraud, or negligence amounting to fraud, can be proved against them: *In re Denham & Co.* (6); *Stringer's Case* (7).

Finlay, Q.C., and *Farwell*, for the legal personal representatives of *Bilborough*:—

Bilborough committed no breach of trust, and an action for negligence *moritur cum personâ*, even if it could have been brought in his lifetime.

They cited, as to the payment by the directors of dividends out of capital, *Turquand* v. *Marshall*, and *Overend & Gurney Co.* v. *Gibb*; and as to error of judgment made in good faith by directors, *Lindley* on Partnership (8).

[STIRLING, J., referred to *Flitcroft's Case* (9).]

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(1) Law Rep. 6 Ch. 104, 118.
(2) 35 Ch. D. 502.
(3) 52 L. T. (N.S.) 409, 416.
(4) Law Rep. 5 H. L. 480.
(5) Law Rep. 4 Ch. 376.
(6) 25 Ch. D. 752.
(7) Law Rep. 4 Ch. 475.
(8) 4th Ed. p. 594.
(9) 21 Ch. D. 519.

Hastings, Q.C., and *Ashton Cross*, for *Crabtree*:—

As regards the payment of dividends, the company can have no remedy against *Crabtree*, whatever may be the case as to the directors, for he was the servant of the directors, for whom he prepared the balance-sheets, and by whom the dividends were declared; neither is he liable in respect of the fees so paid to the directors. He received none, and, as secretary and manager, he was not in any sense a trustee. There may be relief of another character against him under the *Companies Act*, 1862, sect. 165, for misfeasance. But then it must be shewn that the act of misfeasance damaged the company; whereas, here all that he did was to prepare balance-sheets for the directors. The £900 paid to him by the directors was paid under the resolution passed by the shareholders and cannot be recovered from him any more than the money paid to the shareholders can be recovered from them.

Bardswell, for the Defendant *Barry*, claimed the benefit of the arguments on behalf of the other directors.

Decimus Sturges (with him *Tindal Atkinson*, Q.C.), for *Locking*, the auditor:—

The case of Mr. *Locking* is altogether different from that of the other Defendants, and this is the first time that an auditor has ever been made a Defendant to an action of this character.

Locking was a mere servant of the directors, employed at an annual fee, which at first was only 5 guineas, and never was more than £12, and was given for the performance of work of a particular character. It was not his duty to keep the accounts, and according to the judgment of Lord *Chelmsford* in *Spackman* v. *Evans* (1) (the only case in which the duties of auditors are discussed), it is no part of the office of an auditor "to inquire into the validity of any transaction appearing in the accounts of the company." *Locking's* duty was to see that the balance-sheet represented, and was a true result of what appeared in the books of the company; and his certificate goes no further than that. The auditor is a machine for this purpose only, and a true balance-sheet from his point of view is one which shews correctly what appears in the company's books. When he finds in the books that debts are due to the company, all he can do is to ask the directors and manager whether they are good debts, and if he is told that they are, he is justified in making his certificate. He cannot go behind the books of the company. The inconvenience of requiring more from an auditor is obvious.

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(1) Law Rep. 3 H. L. 171.

No fraud can be proved against *Locking*. There was no negligence on his part. He was simply deceived.

Again, the damage is too remote. It was no part of his duty to shew on what kind of estimate the dividends ought to be declared, and the improper payment of dividends was not the natural result of his acts.

Having regard to the amount of an auditor's remuneration, it would be one of the most alarming and ill-paid of occupations if he were to be liable for the remote consequences of the admission of particular items appearing, as he is correctly told in the company's books. The declaration of the dividends was not the result of anything that this auditor did, but was in fact, in the words of art. 79 of the articles of association, the directors' "estimate" of the result of the account, and of what ought to be done, having regard to the state of the books. At all events, the auditor can only be liable for the period not covered by the *Statute of Limitations*, and this being so, the Court should dismiss the earlier balance-sheets from its mind.

Ingle Joyce (with him *Tindal Atkinson*, Q.C.), for the Defendant *Whitaker* —

Whitaker was only a director while one dividend was paid, *i.e.*, that of 1882, and can only be liable, if at all, in respect of that payment. The Plaintiff ought to have proceeded under sect. 165 of the *Companies Act*, and *Whitaker* ought to be liable to no further costs than if the Plaintiff had so proceeded.

Sir *Horace Davey*, in reply:—

Locking, the auditor, was not the servant of the directors, but of the company. According to his own admission he never looked at the articles of association of the company to see what the duties were which he was paid by the company to perform. But this is no excuse; he must be taken to have known what such duties were, and it is quite clear that he did not discharge them, and that his certificates were untrue. It is for the precise purpose of protecting a company from errors, innocent or otherwise, that an auditor is appointed. His duty is not merely to see that the balance-sheet correctly represents what appears in the books. His duty is to check the directors and manager. *Spackman* v. *Evans* (1) only shews that auditors are not the agents of the shareholders, "so as to conclude the shareholders by their knowledge of any unauthorized acts of the directors." From Mr. *Locking's* point of view a true balance-sheet was one which shewed a dividend. But here it was impossible truly to frame a balance-sheet so as to shew a profit. As to the directors, they were recklessly indifferent and simply did nothing. So it is not a case of inadvertent misapplication by directors who have honestly performed their duty, but have been badly advised, within the principle of *London Financial Association* v. *Kelk* (2), but the case of directors who have committed a clear breach of duty in delegating to their manager what they ought to have done themselves, and who are liable for the consequences, and cannot avail themselves of the plea of *bona fides* if it be a good one: *Rance's Case* (3).

1887. Aug. 9. STIRLING, J. (after partially stating the facts of the case, continued):—

There appears to me to be a fundamental difference between the two classes of acts in respect of which it is sought to fix the Defendants with liability. It is now settled by decisions of the House of Lords and Court of Appeal that the capital of a company formed under the Act of 1862 can be legally applied only for the purposes specified in the articles of association. The capital may be lost in the course of such application, and creditors or other persons dealing with the company must take that risk; but they are entitled to act on the faith that no part of the capital will be applied to any other purpose, and in particular that no part of

(1) Law Rep. 3 H. L. 171.
(2) 26 Ch. D. 107.
(3) Law Rep. 6 Ch. 104.

the capital will be returned to the shareholders except in the cases and under the safeguards in and under which a reduction of capital is permitted by the various Acts of Parliament.

Among the objects for which the present company was formed was the lending of money on security; and the acts of the directors with reference to any advances they made were within the powers of the company: but if (as is alleged) they paid dividends out of capital, their acts in this respect were beyond the powers of the company and contrary to law.

It has now been decided that directors are trustees or *quasi* trustees of the capital of the company, and are liable as trustees for any breach of duty as regards the application of it, but when such liability is sought to be enforced it has to be determined on the facts of each particular case whether a breach of duty has been committed.

Now it is obvious that the duties of the directors of a trading company with reference to advances on security made in the course of conducting the business of a company formed for the purpose of making such advances are totally different from those (for example) of the trustees of a settlement. The funds which form the subject of a settlement are intended to be preserved for the benefit of those who may successively become entitled to them, and it is the duty of trustees making advances out of such funds to take care that the securities they obtain are such as will expose the beneficiaries to as little risk of loss as may be. The funds embarked in a trading company, on the other hand, are placed under the control of the directors in order that they may be employed for the acquisition of gain, and risk (greater or less, according to circumstances) is of the very essence of such employment. When the advance of money on security is one of the objects of such a company the acts of directors with reference to the advances are to be judged not by the rules which have been laid down as to the investment of settled funds but (more nearly at all events) by those which regulate the duties of the managing partners of an ordinary trading firm as between themselves and those partners who do not take an active part in the conduct of the firm's business.

Accordingly, it is settled by such cases as *Overend & Gurney*

Co. v. *Gibb* (1) and *Turquand* v. *Marshall* (2) that directors are not to be made liable for loss occasioned by mere imprudence or error of judgment in the exercise of the powers conferred on them. The case sought to be made against the Defendants with regard to the advances complained of falls within this rule, and, indeed, after the evidence on behalf of the Plaintiff was given this head of complaint was abandoned by the Plaintiff's counsel, and so much of the action as relates to it must be dismissed.

The case as regards the payment of dividends out of capital stands in a very different position, and the law as regards it is perhaps not yet completely settled. It follows from the decisions in *In re National Funds Assurance Company* (3) and *Flitcroft's Case* (4) that directors who make such payments either with actual knowledge that the capital of the company is being misappropriated or with knowledge of the facts which establish the misappropriation are liable as for a breach of trust. The present case does not fall within those which I have just mentioned, for I am unable on the evidence before me to arrive at the conclusion that the directors had actual knowledge of the real state of the company's affairs. I have, however, the guidance of the recent judgment of Mr. Justice *Kay* in *In re Oxford Benefit Building and Investment Society* (5), a case which was much—I may almost say exclusively—relied on by the counsel for the Plaintiff, and which, although it is not precisely identical with the present, nevertheless closely resembles it in many of its features. The judgment was given after an elaborate argument by very eminent counsel, and after full consideration by the learned Judge who decided it, and it is certainly an authority not to be departed from by a Judge of co-ordinate jurisdiction except on the clearest ground.

In that case as in the present it was contended that directors who had continually paid dividends out of capital could not be made liable unless their conduct amounted to fraud. "From that proposition," says the learned Judge, "I must express my dissent," and he accordingly held that directors who had omitted

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(1) Law Rep. 5 H. L. 480.

(2) Ibid. 4 Ch. 376.

(3) 10 Ch. D. 118.

(4) 21 Ch. D. 519.

(5) 35 Ch. D. 502.

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to lay before the shareholders proper accounts of income and expenditure and balance-sheets, and who acted negligently or carelessly as regards the ascertaining of the profits which they professed to divide, were jointly and severally liable to repay the sums improperly paid out of capital by way of dividends.

It was, however, contended on behalf of the Defendants that the case of *In re Oxford Benefit Building and Investment Society* (1) was inconsistent with previous decisions which were binding on me, and in support of that proposition there were cited *Overend & Gurney Co.* v. *Gibb* (2), *Turquand* v. *Marshall* (3), and other cases of the same class. These, however, are distinguishable on the ground that, as I have already endeavoured to point out, they relate to acts within the powers of the directors and not to acts (such as payment of dividends out of capital) which are beyond the legal powers of the directors or of the company. The law prohibits the payment of dividends out of capital, and it may well be that directors are called upon to exercise greater care when they are in danger of violating such prohibition than when they apply the capital for purposes unquestionably within the objects of the company. So, if a company were formed for the purpose of working a mine, it might be the duty of those engaged in superintending its operations to exercise greater care when they approach their neighbour's property and are in danger of committing a trespass than when the scene of action is undeniably within the boundaries of the company's property.

Another case cited, and one which undoubtedly is in point, is *Rance's Case* (4), decided in 1870. It was there sought to compel a director to refund a dividend or bonus alleged to have been improperly paid out of capital, and the application came in the first instance before Lord *Romilly*, who in his judgment laid it down that "in order to make directors liable in a case like this there must be either proof of distinct fraud or else of such gross and wilful negligence as is equivalent to fraud" (5); and he held that in the particular case the director was not liable. If this statement of the law had been adopted by the Court of Appeal

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(1) 35 Ch. D. 502.
(2) Law Rep. 5 H. L. 480.
(3) Law Rep. 4 Ch. 376.
(4) Ibid. 6 Ch. 104.
(5) Law Rep. 6 Ch. 110.

(who reversed Lord *Romilly's* decision) it would no doubt have been a strong authority in favour of the Defendants, but neither of the very eminent Judges who then constituted the Court of Appeal appears to me to have taken that view of the law.

[His Lordship then read from the judgment of Lord Justice *James* in *Rance's Case* the passage commencing on page 117 with the words "The directors simply had before them," and ending on page 118 with the words "But no such account at all was made out;" and the passage commencing on page 119 with the words "I think the Master of the Rolls," and ending on page 120 with the words, "the costs of the application below."

His Lordship also read from the judgment of Lord Justice *Mellish* in the same case the passage commencing on page 122 with the words, "In my opinion such a declaration," and ending on page 123 with the words, "that it was made out of profits."

His Lordship then continued:—]

It seems to me that the views expressed by the learned Judges who decided *Rance's Case* (1) are consistent with the proposition that directors who are proved to have in fact paid a dividend out of capital fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of account such as it was their duty to prepare and submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements of account submitted to them; and if this be so, *In re Oxford Benefit Building and Investment Society* (2) does not, in my opinion, conflict with *Rance's Case*.

I now proceed to consider the facts of the present case. [His Lordship then read article 63 as to the remuneration of the directors, and articles 79 and 80 as to the declaration and payment of dividends, and continued:—] It was contended on behalf of the Defendants—and I think rightly—that upon the true construction of articles 79 and 80 dividends were payable, not (as in *In re Oxford Benefit Building and Investment Society*) out of "realized profits," or "profits tangible for the purpose of division," but (as in *Stringer's Case* (3)) out of estimated profits. In the words of

(1) Law Rep. 6 Ch. 104.

(2) 35 Ch. D. 502.

(3) Law Rep. 4 Ch. 475.

Lord Justice *Giffard*, in the last-mentioned case, the dividends were to be paid "out of profits, although those profits were not profits in hand."

[His Lordship then read the other articles referred to above as to the accounts, statement and balance-sheet, and the duties of the auditor, and resumed:—]

It was in my opinion the duty of the auditor not to confine himself merely to the task of verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles of association (and consequently a proper income and expenditure account), and was properly drawn up, so as to contain a true and correct representation of the state of the company's affairs.

[His Lordship then stated and commented on the evidence as to the manner in which the books of the company were kept, the statement of income and expenditure rendered, and the balance-sheets prepared, and observed:—]

In my judgment these balance-sheets were prepared by *Crabtree* simply and solely with a view to the declaration of a dividend, and not with the object of exhibiting "a true and correct view of the state of the company's affairs." It is to be observed that throughout no statement of income and expenditure, such as prescribed by arts. 87 and 88 was ever submitted to the directors or shareholders, though the accounts prepared under *Crabtree's* direction in 1880 and 1882 shew that the preparation of such statements was perfectly feasible. The reason why they were not submitted to the shareholders is not, in my judgment, far to seek. The accounts prepared for 1880 and 1882 shew a loss, and the researches of the official liquidator prove that every such statement, except that for the year 1876, must, according to the system of bookkeeping adopted by *Crabtree*, have shewn a like result.

[His Lordship then referred to the certificates of Mr. *Locking* and the letter addressed by him to the directors in 1871, and resumed:—]

Mr. *Locking* stated in his evidence that he did not during the period of his auditorship see the articles of association of the company. This statement, if true, appears to me to afford no excuse for him, for he admitted that he knew of their existence; but it would afford some evidence as to the degree of care which the directors bestowed upon the instructions given to him.

Mr. *Locking* stated in his evidence that he did not consider it part of his duty to ascertain whether the deductions made by *Crabtree* were sufficient, or on what principle they were made: and he admitted them to be arbitrary deductions which *Crabtree* considered sufficient. As regards the securities on which the moneys were lent, he appears to have simply asked whether they were considered to be fully equal to the amount stated, and to have accepted the statement that they were not only equal to, but worth more than the amount placed against them. It appears, therefore, from his own evidence that the duties of the auditor as defined by the articles of association were not in reality discharged by him.

Now the directors were all men of business, and appear to have regularly attended all the board meetings and the general meetings of the company. Each one of them says that he was ignorant of the mode in which the balance-sheets were prepared and of the inaccuracies contained in them, and that he trusted entirely to the secretary and manager and the auditor. I see no reason to doubt these statements, still the fact remains that they did not require either that *Crabtree* should present the accounts, or that *Locking* should report on them in the form and manner prescribed by the articles of association; and I cannot but attach considerable importance to this, for if the annual accounts of income and expenditure had year after year shewn, in accordance with the fact, that no profit was earned, it is impossible to suppose that the attention of members, probably of creditors of the company, would not have been directed to the question whether or not dividends could under those circumstances be properly paid, and the crisis in the company which occurred in 1882 would in all likelihood have arisen at a much earlier period, with the probable result that either a sounder mode of carrying on business would have been adopted, or else that the company would have been wound up before great loss was incurred.

[His Lordship then alluded to further evidence, which he considered shewed that the directors must have been aware that the assets of the company were over-estimated without taking any steps to ascertain the amount of the error, and that they accepted from *Crabtree* a statement that one *Newsome* had valued the freehold property of the company at £5000 for the purposes of a loan from an insurance company without requiring the production of the valuation (of the existence of which no evidence was produced), and thereupon presented to the shareholders accounts in which the value of the company's property was set down at an excessive amount, and a profit was shewn for the current year. His Lordship then continued:—]

Now I do not say that a trading company formed, as this was, for the purpose of carrying on speculative dealings in land, may not from time to time have valuations made of the properties which it has acquired in the course of its operations; and I do not stop to inquire whether the permanent office of the company stands in any different position from other property. Neither do I say that where the articles of association authorize (as in the present case) the payment of dividends upon an estimate of accounts, the directors may not, in proposing or recommending a dividend, act upon the valuations so made from time to time.

The present case appears to me to be widely different. No real estimate of the value of the property was made, and I cannot think that the directors acted as prudent men of business, or as they would have done in conducting their own private affairs, in acting on the unsupported statement of their secretary as to the existence of a valuation which he never saw, and thus converting accounts which would otherwise have shewn a loss into accounts shewing a profit available for the payment of a dividend of 5 per cent.

The conclusion at which I have arrived, upon a consideration of the whole evidence, is, that the directors never exercised any judgment at all with reference to these accounts, but accepted without inquiry or verification whatever *Crabtree* and *Locking* told them. In this respect they failed, as I think, to perform the duty cast upon them by the articles of association. That duty was to cause estimates of account to be prepared, and upon those estimates to recommend a dividend. In the performance of that duty they were no doubt entitled to avail themselves of the advice and assistance of their secretary and manager, and to obtain by that advice and assistance such materials as were proper for the purpose of enabling them to decide upon the questions they had to consider; and having so done they were bound to exercise their judgment as mercantile men on the materials which they had obtained. This, in my opinion, they never did; but in truth they delegated to *Crabtree* the exercise of that judgment and discretion which it was their duty to take upon themselves. Upon the whole, although the directors were, I believe, ignorant of the true state of the company's affairs, and although I find no trace of their having acted with the view of obtaining any improper benefit for themselves, I feel compelled to hold that they have fallen short of that standard of care which, having regard to the *Oxford Case* (1), they ought to have applied to the affairs of the company in the following respects:—(1.) They never required the statement and balance-sheets to be made out in the manner prescribed by the articles; (2.) They failed properly to instruct the auditor, or, at all events, to require him to report on the accounts and balance-sheets in the mode prescribed by the articles; and (3.) they were content throughout to act on the statements of *Crabtree* without inquiry or verification of any kind other than the imperfect audit of the accounts by *Locking*. Those accounts and balance-sheets did not truly represent the state of the company's affairs; and that being so, I think that according to what is laid down in *Rance's Case* (2), the onus is laid upon them to shew that the dividends they paid were paid out of profits. This upon the evidence before me they fail to do.

The liquidator has made out a series of balance-sheets, and profit and loss accounts, such as ought to have been prepared by the directors in accordance with the articles of association. In these accounts the figures (with the exception of those relating to long loans) are in all cases taken from the books and accounts of the company. The instalments received in respect of long loans have been dealt with in the same way as similar payments were dealt with in the *Oxford Case*; that is, the first instalment is treated as applied in payment in the first place of the interest up to the time of payment on the whole principal sum advanced, and next in payment of part of the principal. The second instalment is treated as applied in payment in the first place of the interest on the reduced principal; and so on. The rate of interest has been ascertained in each case by an actuarial calculation, in which the principal sum lent by the company is taken to be the present value of the monthly or other instalments agreed to be paid by the borrower for a term of years. In this way according to the expert evidence on behalf of the Plaintiff (which has not been met by any expert evidence whatever on behalf of the Defendants), the very utmost sum which could in each year be properly treated as income has been ascertained. The result is that in every year a loss appears to have been incurred, and consequently in every year the dividend has been paid out of capital. It was admitted by the Plaintiff's expert witnesses that those calculations were of considerable difficulty, and required actuarial skill which the directors of the company did not and could not be expected to possess: and it was contended on their behalf that the making of an estimate of accounts for the purpose of declaring a dividend was a piece of work which could not be done by themselves, but could only be done upon the advice of skilled persons; that they took and accepted in good faith the advice of such skilled persons, viz., *Crabtree* and *Locking*, and that even if it turned out that such advice was erroneous, the directors ought not to be held liable.

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(1) 35 Ch. D. 502.

(2) Law Rep. 6 Ch. 104.

In order that this argument might prevail, it would seem to me necessary that stronger evidence than that adduced by the Defendants should have been given of the fitness of *Crabtree* and *Locking* for the task assigned to them; but in truth it does not appear to me that there was any such difficulty in dealing with the accounts from a business point of view.

It possibly may have been a task of some difficulty to ascertain with mathematical accuracy the precise sums which in any year could be treated as profits, just as (to recur to an illustration which I have already made use of) it might be difficult in working a mine underground to ascertain with precision the exact boundary which corresponded to that defined on the surface, nevertheless it might be easy in the case of the mine to make sure practically that the mining operations were confined within proper limits, and possibly this result might be attained in more ways that one. In the present case the evidence convinces me that there was no difficulty at all in forming (possibly in various ways) estimates of those profits which would have been perfectly sufficient for the purposes of business men, and would have prevented the payment of dividends out of capital. Not one of the directors ever applied his mind to the formation of any such estimate. Everything was left in the hands of *Crabtree*, with the result that, according to the balance-sheets prepared by the liquidator, in a manner most favourable to the directors, a sum of £3394 18*s*. 10*d*. has been paid out of the capital of the company in the shape of dividends. The several Defendants who were directors at the time when these dividends were respectively paid are in my judgment jointly and severally liable for the amounts improperly paid away in each year of their directorship, and must (as in the *Oxford Case* (1)) be ordered to repay such amounts with interest at 4 per cent.

It follows that as the deceased director *Bilborough* was guilty of a breach of trust in respect of the payments so improperly made, his estate is liable to make good the amount of them with interest at the like rate, and there must be judgment against his executrix accordingly.

The case of the Defendant *Whitaker* is somewhat different from that of the others, and it may be right that I should say a few words as to it. He was elected a director in May, 1881, but did not take his seat at the board until August following. The balance-sheet for the year ending the 30th of April, 1882, was prepared by *Crabtree* and was audited by *Charles Beevers*, who had succeeded *Locking* as auditor in 1881. The balance-sheet purported to shew a profit for 1882 of £219 8*s*., and *Beevers* certified these accounts to be a true copy of those shewn in the books of the company. At a board meeting held on the 17th of May, 1882, when the balance-sheet for the year 1881–1882 was considered, *Whitaker* moved that a dividend of 6 per cent. should be recommended, and the resolution was carried. At a meeting on the 19th of May at which he was present, together with *Scott* and *Bilborough*, the balance-sheet

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was again considered, and it was resolved that a dividend of 5 per cent. should be recommended.

A general meeting of the company was held on the 26th of May, 1882, at which *Whitaker* took the chair. A statement was made by the auditor, *Charles Beevers*, that the company was not justified in declaring any dividend at all, but ultimately it was resolved that a dividend of 2 per cent. should be declared and paid, whereupon *Beevers* declined to accept the post of auditor for the ensuing year.

The dividend so resolved upon was paid with full knowledge on the part of *Whitaker* and his co-directors that the auditor had stated to the general meeting that the company was not justified in paying any dividend: and the vote of the shareholders could not affect the rights of the creditors of the company. Under these circumstances the directors ought either to have resigned, or, if they chose to continue in office, ought to have taken measures (as they might have done) to prevent funds which ought to have been available for payment of the creditors' debts from passing into the hands of the shareholders. I hold, therefore, that *Whitaker* is liable with the other directors to make good the amount of the dividend so paid.

It is further sought to make the directors liable for sums amounting to £540 2*s.* 6*d.* paid to themselves as remuneration, and for sums amounting to £900 paid as bonuses to *Crabtree.* The directors were not entitled to any remuneration, nor was *Crabtree* entitled to any bonus unless the company paid a dividend of 5 per cent. The balance-sheets prepared by the liquidator shew that in no year could any such dividends have been properly paid; and in accordance with the decision in the *Oxford Case* (1) I must hold that the directors are liable to make good the sums in question.

I have next to consider the liability of *Crabtree.* It was his duty as the secretary and manager to prepare balance-sheets such as were required by the articles, and exhibiting a true and correct view of the state of the company's affairs. He never prepared any accounts of income and expenditure at all, and the balance-sheets prepared by him did not and were not intended to represent truly the state of the company's affairs; and (as I have already stated) I think if proper accounts had been prepared, either the company's course would have been altered or its career brought to an earlier close. It was hardly contended that he was not liable for the bonuses which were paid to him on the faith of the accounts and balance-sheets which he prepared; and it further appears to me that the balance-sheets were prepared for the purpose of shewing that a dividend was payable, and on the face of them treated the dividends which were actually paid as properly payable. The payment of these dividends was the natural and immediate consequence of the breach of duty on *Crabtree's* part, and he is liable for damages to the amount so paid.

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Locking, the auditor, also appears to me to have been guilty of a breach of duty to the company. He has, however, pleaded the *Statute of Limitations* by way of defence, and the Plaintiff, without arguing the question, has admitted the validity of the plea, which will cover all the accounts except those for the years 1878–1879, and 1879–1880. In each of those years *Locking* certified that the accounts were a true copy of those shewn in the books of the company. That certificate would naturally be understood to mean that the books of the company shewed (taking for example the certificate for the year 1879) that on the 30th of April, 1879, the company were entitled to "moneys lent" to the amount of £29,515 15*s*. This was not in accordance with the fact; the accounts in this respect did not truly represent the state of the company's affairs, and it was a breach of duty on *Locking's* part to certify as he did with reference to them. The payment of the dividends, directors' fees, and bonuses to the manager actually paid in those years appears to be the natural and immediate consequence of such breach of duty; and I hold *Locking* liable for damages to the amount of the moneys so paid.

Accordingly the action will be dismissed so far as it claims relief in respect of the advances made by the directors. There will be judgment for the general costs of the action against all the Defendants except *Whitaker*, but as against *Whitaker*, I think only such costs ought to be given as the Plaintiff would have been entitled to if he had made against him only such case as

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is made by the paragraph of the statement of claim which refers to the dividends paid in 1882.

The form of the order made in *In re Oxford Benefit Building and Investment Society* (1), which was well considered, must be followed in this case.

Solicitors: *Bell, Brodrick & Gray*, agents for *Hopps & Bedford, Leeds; Torr, Janeways, Gribble & Oddie*, agents for *Middleton & Sons, Leeds; Blair & W. B. Girling; Torr & Co.*, agents for *T. Simpson, Leeds; Richard Smith & Wilmer; Hamlin, Grammer & Hamlin*, agents for *Pullan, Leeds; Hamlin & Co.*, agents for *Dunn & French, Leeds; Speechly, Mumford & Co.*, agents for *Rooke & Midgley, Leeds.*

(1) 35 Ch. D. 502.

W. W. K.

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BILL OF EXCHANGE—*Dishonour—Damages—Bill dishonoured abroad—Interest—Re-exchange—Bills of Exchange Act,* 1882 (45 *&* 46 *Vict. c.* 61), *s.* 57.] *Held*, on the construction of sect. 57 of the South Australian Bills of Exchange Act, 1884 (which for this purpose is identical with sect. 57 of the English Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61)), that, when a bill of exchange has been dishonoured abroad (i.e. out of the colony) the only damages which the holder can recover are the amount of the re-exchange, with interest thereon, as provided by sub-sect. 2 of sect. 57, and that he has no option to sue for interest under sub-sect. 1. *In re* Commercial Bank of South Australia - - - 522

BILL OF SALE—*Registration—Debenture—Memorandum of Agreement—Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 17.] A memorandum of agreement between a company of the one part and the several persons named in the schedule thereto, called the lenders, of the other part, whereby the company covenanted to pay, on a day named, to each of the lenders (nine in number) the sum advanced by him, with interest, and as security for the payment thereof charged therewith all its undertaking, property, estate and effects of every kind;—*Held*, to be a debenture in the ordinary acceptation of the term, and within sect. 17 of the Bills of Sale Act, 1882.—A debenture may consist of one document. It is not necessary that there should be a serial issue of documents to constitute them debentures. Edmonds *v.* Blaina Furnaces Company. Beesley *v.* Blaina Furnaces Company - - - - - - 215

2. —— *Registration—Sale of Goods—Entry in Auctioneer's Book—"Assurance of Personal Chattels"—Bills of Sale Act,* 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4, 8—*Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17.] Where a contract for sale of goods within sect. 17 of the Statute of Frauds is valid solely by virtue of a memorandum in writing, such memorandum is an assurance of personal chattels within the Bills of Sale Act, 1878.—At a sale of farm produce by auction, W. bought a stack of hay for £40 5*s.* The auctioneer's clerk signed the name of W. as purchaser in the auctioneer's book, which was also signed by the auctioneer, and contained a copy of the conditions of sale, and specified the lot and the price. No part of the purchase-money was paid, one of the conditions being that the purchaser was to have six months' credit, and the whole of the hay remained on the premises of the vendor and in his apparent possession. The entry in the auctioneer's book was not registered as a bill of sale under the Bills of Sale Act, 1878. The hay was seized in execution under a judgment obtained by creditors of the vendor:—*Held*, that as the sale would have been void under sect. 17 of the Statute of Frauds but for the memorandum of the contract contained in the auctioneer's book, such memorandum was an assurance and a bill of sale within the Bills of Sale Act, 1878, and therefore void as against the execution creditors for want of registration. *In re* Roberts. Evans *v.* Roberts - - - - 196

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BUILDING SOCIETY—*Withdrawing Member—Reference of Disputes to Arbitration—*37 *&* 38 *Vict. c.* 42, *s.* 34—47 *&* 48 *Vict. c.* 41.] By one of the rules of a benefit building society formed under the Act of 1874, it was provided that a member might by notice in writing withdraw, and should be entitled, "provided there shall be sufficient funds available," to receive within one month after the notice, or earlier if the board should think fit, the subscriptions he had paid on his shares. Another rule provided that the board should have power to determine all matters of dispute between the society and any member or person claiming on account of any member, and that if the party should be dissatisfied with their decision, the matter should be referred to arbitration. A member gave notice to withdraw. The society declined to pay his subscriptions at the end of the month on the ground that they had not sufficient funds in hand; the member contended that they had:—*Held* (affirming the decision of *North*, J.), that though the retired member might be in some sense a creditor, he was still so far a member as to be bound by the rules, and that the dispute must be referred to arbitration.—*Armitage* v. *Walker* (2 K. & J. 211) and *Wright* v *Deeley* (4 H. & C. 209) approved. Walker *v* General Mutual Building Society **C. A.** 777

CANAL COMPANY—*Damage caused by working of Mine—Authority of Act—Negligence—Wrongdoer—Action—Compensation under Act—Injunction—Damage not preventible.*] On the bank of a canal constructed under an old Act of Parliament a mill had been built. In consequence of the working of a coal mine the canal and mill had subsided, and water leaked from the canal into the mill. The mill-owner brought an action against the canal company for an injunction and for damages:—*Held*, that though a company authorized by Act of Parliament were not under the same liabilities as a private person, they were liable for damages if they were guilty of negligence, and that the canal company had been guilty of negligence, inasmuch as they might have prevented the damage; and that they were bound to compensate the mill-owner. But that, under the special provisions of their Act, compensation must be recovered as directed by the

CANAL COMPANY—*continued.*

Act and not by action;—*Held*, that such being the case, an injunction would not be granted, and that apart from this, inasmuch as the time and extent of any further subsidence could not be foreseen, there ought not to be an injunction:—*Held*, that the damage having been caused by the wrong-doing of the mine-owner did not affect the case. Evans *v.* Manchester, Sheffield, and Lincolnshire Railway Company - - 626

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CHARITY—*continued.*

think fit, at the proper costs and charges of the inhabitants of the said parish of G., or otherwise, and not to be let, mortgaged for money, or assigned, to any other use, intent or purpose whatsoever." And it was agreed that, if the inhabitants should discontinue the prescribed use of the building so to be erected, and should be willing to deliver it to the landlord, it should be lawful for them to do so, he paying to the churchwardens or overseers of the parish the then value of the building. The deed was not enrolled under the Mortmain Act, 1736 (9 Geo. 2, c. 36). A workhouse was duly erected on the demised land pursuant to the lease.—In 1862 the workhouse, being no longer required, was pulled down, and no rent having been paid under the lease since 1776, the site was conveyed to a purchaser in fee under the Act 5 & 6 Will. 4, 69, enabling parish authorities to sell the sites of disused workhouses.—An action having been brought by a person claiming to be the reversioner against persons—as alleged assigns of the lease—claiming under the purchase of 1862, to recover the arrears of rent:—*Held*, that the lease was a lease for "charitable uses:" that it failed to comply with the requirements of the Mortmain Act in that, besides non-enrolment it did not take effect in possession and contained reservations in favour of the grantor in the shape of rent and something in the nature of a right of pre-emption: that these defects were not cured by sect. 73 of the Poor Law Act, 1844 (7 & 8 Vict. c. 101), that Act curing only one defect, namely, want of enrolment: and that the lease was accordingly void ab initio, and that the Statute of Limitations began to run against the grantor, if not from the execution of the lease, at all events from the time the rent ceased to be paid. Action dismissed with costs.—*Semble*, land acquired by parish officers to enable them to perform their statutory obligations, as, for instance, by providing a workhouse, is land acquired for a "charitable use."—*Burnaby* v. *Barsby* (4 H. & N. 690) questioned. Webster *v.* Southey - 9

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COMPANY — *Directors — Auditor — Payment of Dividends out of Capital—Misfeasance—Delusive Balance-Sheets —Estimated Profits —Duties and Liability of Auditor—Winding-up.*] The articles of association of a limited company, formed in 1869 for the purpose of lending money on security, provided (1) that when the company should pay a dividend of 5 per cent. the directors should receive a fixed sum for each attendance, and a further fixed sum for every additional 1 per cent. of dividend; (2) that the directors might declare dividends upon such estimates of account as they might see proper to recommend, so that no dividend should be payable except out of profits; (3) that they should annually lay before the company a statement of the income and expenditure of the past year, and a balance-sheet containing a summary of the property and expenditure of the company; (4) that the accounts of the company should be examined every year with the vouchers relating thereto, and the correctness of the balance ascertained by an auditor who should make a report to the members on the balance-sheet and accounts stating whether in his opinion the balance-sheet was a full and fair balance-sheet, containing the particulars required by the articles, and properly drawn up so as to exhibit a correct view of the state of the company's affairs.—The company never made any annual profits except in one year when it made a profit of less than 5 per cent., but the directors in every year from 1870, when the company commenced business, declared and paid a dividend of 5 per cent. and upwards; and they remunerated themselves on the corresponding scale, and, under the authority of a resolution of the company, paid bonuses to the manager. Such payments were in fact made out of capital.—The balance-sheets on which the dividends were declared were prepared not by the directors, but by the manager. They were delusive, they over-estimated the assets of the company, and were framed with the object of shewing a profit available for a dividend. The auditor never looked at the articles of association but accepted the statements of the manager, and certified from time to time that the accounts submitted to him were true copies of those shewn in the books of the company. No proper statement of income and expenditure or auditor's report was ever laid before the company. The directors did not know the true state of the company's affairs or that the balance-sheets were delusive. They never exercised any judgment with reference to the accounts, but relied entirely on the manager and auditor:—*Held* (1), that the directors had fallen short of the standard of care which they ought to have applied to the affairs of the company; and that the onus was upon them to shew that the dividends had been paid out of profits:—*Held* (2), that upon the evidence they had failed to shew this, and that they were jointly and severally liable to make good all sums improperly paid out of capital in respect of dividends to the shareholders, directors' remuneration, and bonuses to the manager.—*In re Oxford Benefit Building and Investment Society* (35 Ch. D. 502) followed.—*Held* (3) that it was the duty of the auditor in auditing the accounts of the company not to confine himself to verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles of association, and was properly drawn up so as to contain a true and correct representation of the state of the company's affairs; and—*Held* (4), that as the improper payments by the directors were the natural and immediate consequence of breach of duty on the part of the manager and the auditor, the manager and auditor were liable in damages to the amounts so paid, except, in the case of the auditor (who had pleaded the Statute of Limitations), so much thereof as was covered by the statute. Leeds Estate, Building and Investment Company *v.* Shepherd - 787

2. —— *Shares—Certificates—Blank Transfer—Brokers—American Law—Mercantile Usage—Defective Title.*] The executors of a holder of shares in an American railroad, in order that the shares might be registered in their names, so as to enable

COMPANY—*continued.*

them to receive the dividends and if necessary to sell, signed blank transfers indorsed on the share certificates, and gave them to their brokers. The brokers fraudulently deposited them with a bank as security for advances, and afterwards became bankrupt. According to American law the holder of certificates with transfers properly indorsed has a good legal title to the shares; and according to mercantile usage in London such certificates were treated as securities to bearer. In this case the indorsement was not so attested as the railroad company required for registration:—*Held*, that the executors must be taken to have given to the brokers authority to deal with the certificates, and that the bank was entitled to hold them.—But *held*, that the executors were not bound to do anything in order to enable the bank to have the transfer registered.—Bankers are not bound to make any inquiry as to securities passing by delivery, which are deposited with them by brokers as security for advances. Williams *v.* Colonial Bank - - - - - - - 659

3. —— *Shares—Certificates—Blank Transfer—Blank Power of Attorney—Deposit of Certificates—Estoppel.*] The New York Central Railroad Company issue to the registered shareholders share certificates; each certificate is for ten shares, and on the back there is a blank form of transfer, and a blank form of power of attorney to execute a surrender and cancellation of the certificate.—The mode of transfer is as follows: The transfer and power of attorney are signed by the registered shareholder. When this blank transfer reaches the hand of some holder who desires to be registered his name is filled in by himself or on his behalf, and the certificate is left with the company; it is then cancelled, the transferee is registered, and a new certificate in his name is issued.—In August, 1883, T. & Co., as the brokers of the Defendant, purchased for him on the market certain shares in the New York Central Railroad Company. The certificates were permitted by the Defendant to remain with T. & Co.—In November, 1883, T. & Co. deposited with the Plaintiffs (with other securities) the certificates for the shares so purchased by them for the Defendant as security for a large sum borrowed by them from the bank. On the 11th of December following the bank re-delivered to T. & Co. the certificates for the shares on the ground that they were desirous of sending them in for registration; and on the same day T. & Co. filled in the name and address of the Defendant on the blank transfers and forms of surrender of the same certificates as the person in whose name the shares were to be registered. The new certificates were made out in the Defendant's name, and were ready for issue on the 20th of December. The blank transfers on the back of these certificates were never signed by the Defendant.—On the 11th of December, when T. & Co. handed the certificates to the agents of the company for registration, they received from them a receipt which they then sent to the Plaintiffs, which receipt the Plaintiffs kept till the beginning of February, 1884, when, having learnt that a member of the firm of T. & Co. had absconded, they sent a clerk to the agents with the receipt, and obtained from them the new certificates for the shares which up to the commencement of the action remained in their possession.—The Plaintiffs claimed a declaration that they were entitled to the shares:—*Held*, that the case did not fall within the principle of estoppel, and that the Defendant was the legal owner of the shares, and entitled to have the new certificates handed to him.—No estoppel can be raised on a document inconsistent with the document itself.—The right principle to adopt with reference to documents such as the certificates with blank transfers duly signed by the registered holders is that each prior holder confers on the bonâ fide holders for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority, and to this extent, but no further, is estopped from denying the title of such holder for the time being.—By delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to the legal estate in the shares or to the complete dominion over them. Colonial Bank *v.* Hepworth 36

4. —— *Shares—Contract for Paid-up Shares—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Registration of Contract—Specific Performance.*] As between the company and A., the duty of registering under the Companies Act, 1867, s. 25, an agreement that a sum of cash voted to A., shall be given to and accepted by him in fully paid-up shares is not specially thrown upon A., but falls upon the party seeking to enforce performance of the contract.—Subject to confirmation by a meeting of shareholders it was agreed by directors of a company to give, and by A. to accept, fully paid-up shares in satisfaction of his admitted claim against the company for services rendered. At the shareholders' meeting it was subsequently resolved "that a sum of £—— be voted to A., which he agreed to take in fully paid-up shares." The agreement was not registered under the Companies Act, 1867, s. 25, and there was no sufficient evidence that there had been any distinctive allotment or acceptance of shares pursuant to the agreement.—On application by the liquidator to place A. on the list of contributories as holder of unpaid shares to the extent agreed to be given:—*Held*, that there had been nothing amounting to a payment in cash for the shares by A.; but that as the only contract between the company and A. was that fully paid-up shares should be given and accepted, a contract to take unpaid shares could not, in the absence of evidence of any assent on the part of A. to vary the original contract, be enforced against A. by the liquidator on behalf of the company; and accordingly that A. was not liable as a contributory for the number of shares mentioned in the agreement.—*Blyth's Case* (4 Ch. D. 140) considered and distinguished. *In re* Barangah Oil Refining Company. Arnot's Case **C. A. 702**

5. —— *Winding-up Order—Prescriptive Corporation—Trust for Benefit of individual Members—Fishery—Right of dredging Oysters—Discretion of Court—Companies Act,* 1862, *s.* 199.] A company or fraternity of free fishermen existed from time immemorial within the manor of F., all the members of which were admitted tenants of the manor, and took an oath of homage to the lord.

COMPANY—*continued.*

No grant to the company as a corporation was in existence, but from numerous ancient documents it appeared that the company had the exclusive right of dredging for oysters and taking other kinds of fish within the manor, for which it paid a rent of £1 3*s.* 4*d.* to the lord. By an Act passed in 1840 it was recognised as a company in the nature of a prescriptive corporation, and it was recited that the members had time out of mind dredged oysters exclusive of all other persons, and that the fishery was of great benefit to the public; it was thereby enacted that the company might exercise all the powers then vested in it, and fresh powers of raising money and charging the profits of the fishery by way of mortgage were given it, the form of mortgage containing no power of sale. Rules were laid down for the management of the company, but it was provided that nothing in the Act should be construed to incorporate the company. The company made by-laws for the regulation of the dredging of oysters, and, subject to these by-laws, the privilege of dredging and fishing was enjoyed by the members for their own benefit.—A petition having been brought by a creditors for winding up the company:—*Held*, that the company was a corporation in which the exclusive right of fishing within the manor was vested; but that the corporation held the right on a condition or trust for the individual members; and that if the company was wound up this right of fishing could not be sold by the liquidator, and therefore the winding-up order would be useless.—The Court accordingly refused to make any order for winding up.—Order of Kay, J., reversed. *In re* THE COMPANY OR FRATERNITY OF FREE FISHERMEN OF FAVERSHAM - - **C. A. 329**

6. —— *Winding-up Petition — Supervision Order or Compulsory Order—Wishes of Creditors —Costs — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 149.] A petition for the compulsory winding-up of a company having been presented by a creditor, if, at the hearing of the petition, the petitioner asks only for a supervision order:—*Semble*, that sect. 149 of the Companies Act, 1862, does not authorize the Court, even at the request of a majority of the creditors, to order a compulsory winding-up against the wish of the petitioner.—A petition having been presented by a creditor for the compulsory winding-up of a company, the Petitioner at the hearing asked for a supervision order, and that order was made:—*Held*, that creditors who appeared and asked for a compulsory order were entitled to costs as supporting the petition. *In re* CHEPSTOW BOBBIN MILLS COMPANY - - - - **563**

7. —— *Winding-up—Removal of Liquidator —Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 93, 141—*Appeal by Liquidator.*] The jurisdiction of the Court to remove a liquidator under ss. 93 and 141 of the Companies Act, 1862, "on due cause shewn," is not confined to cases where there is personal unfitness in the liquidator. Whenever the Court is satisfied that it is for the general advantage of those interested in the assets of the company that a liquidator should be removed, it has power to remove him, and appoint a new one.—*In re Sir John Moore Gold Mining Company* (12 Ch. D. 325) explained.—A liquidator who has been removed by a Judge may appeal against his removal.—Whether a judge can re-hear in Chambers an order which he has previously made in Chambers, but which has not been drawn up—*quære.* *In re* ADAM EYTON, LIMITED. *Ex parte* CHARLESWORTH - - - **C. A. 299**

8. —— *Winding-up — Scotch Agent — Scotch Action—Injunction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 122.] R., a Scotch solicitor, was employed in getting in the Scotch assets in the winding-up of an English company on terms that he was to look to assets of the company alone for remuneration. He commenced an action in Scotland against the official liquidator for taxation and payment of his costs out of the assets of the company in Scotland, and obtained arrestment of such assets. An injunction was granted restraining R. from prosecuting the action. *In re* HERMANN LOOG, LIMITED - - **502**

—— Debenture—Bills of Sale Act - **215**
See BILL OF SALE. 1.

COMPENSATION—Lands Clauses Act - **87**
See LANDS CLAUSES ACT. 1.

CONTRIBUTORY NEGLIGENCE—Canal company—Mine-owner - - **626**
See CANAL COMPANY. 1.

CONVENT—Undue influence - - **145**
See UNDUE INFLUENCE.

CORPORATION—*Lands Improvement Company—River Company—Restricted Power of borrowing—Restriction inferred—Overriding Restriction—Invalid Charge—Power of Corporation—Assent of all the Members.*] The River Dee Company was by Act of Parliament empowered to borrow upon mortgage of lands of the company any sums not exceeding £25,000. The company had, however, borrowed more. After this the Lands Improvement Company having by its Acts powers to advance to landowners money for the improvement of land advanced to the River Dee Company £6405, and by an order the Inclosure Commissioners purported to charge the lands of the River Dee Company with the repayment of that sum and interest by annual instalments:—*Held*, that the powers given by the Lands Improvement Company's Acts did not override the restriction on the borrowing power of the River Dee Company, and that the charge on the lands of the River Dee Company was invalid:—*Held*, that a clause in one of the Lands Improvement Company's Acts making the certificate of the Inclosure Commissioners conclusive evidence of a valid charge under the Act did not render such a charge valid.—Where by an Act of Parliament a corporation is empowered to borrow a certain sum of money a restriction against borrowing more will be implied.—Where a corporation is created by Act of Parliament, and by Act of Parliament restrictions as to the dealings with its property are imposed upon it, the assent of every individual member of the corporation will not make valid as against the corporation that which it was restrained from doing. BARONESS WENLOCK *v.* RIVER DEE COMPANY - - **674, 675, n.**

—— Prescriptive—Fishery - - **329**
See COMPANY. 5.

COSTS—Administration—Ascertaining class 486
See Practice. 3.
—— Bill of costs - - 105, 194, 262, 566
See Solicitor. 1, 2, 3, 4.
—— Discretion of Taxing Master—Appeal 444
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—— Higher and lower scale - - 359
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—— Taxation — Objections to Taxing Master's finding - - - - 194
See Solicitor. 4.

COUNTER-CLAIM — Mortgage action — Particulars - - - - 505
See Practice. 7.

COUNTY COURT—Transfer to—Insolvent estate
See Bankruptcy. [233

COVENANT—*Vendor and Purchaser—Restrictive Covenant—Rights of Purchaser—Building Land —Injunction.*] An estate was laid out for building, and a great part of it had been sold. In 1882 some of the unsold part was put up for sale by auction with a condition that the purchaser of certain lots was to covenant to expend on each of the dwelling-houses built not less than £1200. As to some lots there were other restrictions; and some were free from restriction. One of the Plaintiffs bought some of the free lots, and also a restricted lot, not being one of the first-named. Next year the unsold lots, together with another piece of land forming together the whole of the unsold parts of the estate, were put up for sale, with similar conditions as to the first-named lots; but as to other lots free from restrictions. All the lots were then sold, except the first-named lots, both Plaintiffs being purchasers of free lots. The first-named lots were in the following year sold to the Defendant, who entered into a covenant with the vendors not to build houses of less value than £1200. He now proposed to build houses of less value:—*Held*, that the doctrine of *Nottingham Patent Brick and Tile Company* v. *Butler* (15 Q. B. D. 261; 16 Q. B. D. 778) ought not to be extended to cover the present case, and that the Plaintiffs were entitled to restrain the Defendant from building houses of less value.—The Plaintiff in such a case is not obliged to prove damage in order to obtain an injunction. Collins *v.* Castle - - - - 243
—— In further assurance—Enlargement of base fee - - - - - 716
See Tenant in Tail.
—— Restraint of trade - - 359, 411
See Restraint of Trade. 1, 3.

CUSTOM OF TRADE—Usage of bankers - 659
See Company. 2.

CUSTOMS ANNUITY FUND—*Nature of Interest of Subscriber — "Nominee" — Nomination as Trustee—Jurisdiction of Court of Lunacy to nominate on behalf of Lunatic Subscriber — 56 Geo. 3, c. lxxiii., s. 9.*] On the construction of the Act 56 Geo. 3, c. lxxiii., by which the Customs Annuity and Benevolent Fund was established, and of the rules made under the authority of that Act:—*Held*, that the interest of a subscriber to the fund in an assurance effected upon his own life is not of the nature of property, but that he has only a limited power of appointment among the objects defined by the rules, *i.e.*, his wife, children, and other relatives, and his "nominees" as prescribed by the rules:—*Held*, therefore, that the Court of Lunacy has no jurisdiction to appoint a "nominee" on behalf of a lunatic subscriber:—*Held*, also, that a "nominee" must be a person who is to take a beneficial interest in the fund, and that there cannot be a nomination of a person who is to take as a trustee for others.—Decision of Malins, V.C., in *In re Pocock's Policy* (Law Rep. 6 Ch. 445) disapproved. [Reversed by Court of Appeal.] Urquhart *v.* Butterfield - - - - - 55

2. —— *Legacy Duty — Property — Special Power of Appointment.*] The interest of a subscription to the *Customs Annuity and Benevolent Fund* is not the property of the subscriber, but is only subject to a special power of appointment among a particular class of objects. It is not therefore subject to legacy duty. Attorney-General *v.* Rowsell - - - 67, n.

DAMAGES—*Injury to Property by Flood—Injury to Reversion.*] Owing to the negligence of the Defendants a building estate belonging to the Plaintiff was overflowed by a flood. Part of the land was covered with houses (A) which were in the Plaintiff's possession. Another part was covered with houses (B) erected by builders under building leases. Other parts were the subject of building agreements under which houses (C) were in course of erection, and the Plaintiff was bound to make and had made advances to the builders on the security of the property. The remainder of the land (D) was vacant, and in the Plaintiff's possession. The amount of damages to which the Plaintiff was entitled was referred to a special referee. In respect of (A) the referee allowed as damages (1) the expense of repairing the houses, and the rent during the period of repairs; (2) the loss arising from reduced rental for four years in consequence of the prejudice against the neighbourhood caused by the flood. As to (B), he found that there was no injury which would last to the end of the leases, but he allowed a sum for depreciation of the selling value of the landlord's interest, in consequence of the houses being worth less to let. As to (C), he deducted the value of the houses when repaired and completed, less the expense of repairing and completing them, from the amount advanced, and awarded this difference to the Plaintiff for depreciation of mortgage securities. As to (D), he gave three months of an estimated rent for delay in letting. *Chitty*, J., refused to disturb the report:—*Held*, on appeal that (A) (2) must be disallowed, for that loss of rental arising from the prejudice against the neighbourhood caused by the flood was not the natural result of or directly caused by the flood, and was not a legitimate ground for giving damages:—*Held*, that the sum allowed in respect of (B) must also be disallowed, for that a reversioner can only recover damages where the injury to the property is permanent, so that it will continue to affect it when the reversioner comes into possession, and he is not entitled

DAMAGES—*continued.*
to damages in respect of a temporary injury, on the ground that it affects the present saleable value of his reversion:—*Held*, that the sum given for depreciation of mortgage securities (C) must be disallowed, and an inquiry directed with a view of ascertaining to what extent the flood had made those houses a less sufficient security for the plaintiff's advances than they were before. Rust *v.* Victoria Graving Dock Company, and London and St. Katharine Dock Company C. A. 113

—— Agreement to enter into agreement - 695
See Agreement for Lease.

—— Bill of exchange—Dishonour abroad 522
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—— Sale of right of way - - - 619
See Vendor and Purchaser.

DEATH—Presumption of - - - 586
See Evidence. 2.

—— Without leaving issue - - - 508
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DEBENTURE—Bills of Sale Act - - 215
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DEBTORS ACT—Imprisonment under 138, 530
See Practice. 1, 2.

DELAY—Specific performance - - 619
See Vendor and Purchaser.

—— Amendment of pleadings—Appeal - 770
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—— Undue influence - - - 145
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DEPOSIT—Certificates of shares - - 36
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DIRECTOR—Misconduct—Payment of dividends out of capital - - - 787
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DISHONOUR—Bill of exchange—Damages 522
See Bill of Exchange.

DIVIDENDS—Payment out of capital—Liability of directors - - - - 787
See Company. 1.

DOMICIL—*Abandonment of Domicil of Choice—Change of Intention—Revival of Domicil of Origin.*] In order to lose the domicil of choice and revive the domicil of origin it is not sufficient for the person to form the intention of leaving the domicil of choice, but he must actually leave it with the intention of leaving it permanently. *In re* Marrett. Chalmers *v.* Wingfield - 400

ENROLMENT—Gift to charity - - 9
See Charity.

ESTATE TAIL—Enlargement of base fee - 716
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—— Deposit of certificates of shares - 36
See Company. 3.

EVIDENCE—*Inspection of Banker's Books—Ex parte Order—42 & 43 Vict. c. 11, s. 7.*] An order giving liberty to inspect a banker's books and take copies of any entries therein for the purposes of legal proceedings, may be made under 42 & 43 Vict. c. 11, s. 7, on the application of a party to such proceedings *ex parte* and without evidence; though generally it is better that notice of the application should be served on the person whose account is to be inspected, and in some cases the Court may require evidence of the *bona fides* of the application, and of the materiality of the inspection.—Decision of *Kekewich*, J., affirmed. Arnott *v.* Hayes - - - C. A. 731

2. —— *Presumption of Death — Person not heard of for Seven Years—Proof of Time of Death.*] The administrator of a person who had not been heard of since 1873 had in his hands a sum of money belonging to the intestate. He took out an originating summons upon which inquiries were directed, in answer to which the Chief Clerk found that the intestate was dead in 1800, but that there was no evidence to shew that he died at any date before that year. The Chief Clerk also found the persons who would have been the intestate's next of kin if he died in 1883, and the persons who would have been his next of kin if he died in 1880. The two classes consisted of different persons:—*Held*, that neither class of next of kin had made out a title to the fund, but that the case must go back to the Chief Clerk for further inquiry.—*In re Westbrook's Trusts* (W. N. 1873, p. 167) commented on. *In re* Rhodes. Rhodes *v.* Rhodes - - - - 586

EX PARTE ORDER—Inspection of banker's books - - - - 731
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FIDUCIARY RELATION—Banker—Loan to customer—Repayment - - 25
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FLOOD—Injury to property by - - 113
See Damages.

FOREIGN GOVERNMENT—De facto and de jure - - - - - 489
See Practice. 9.

FOREIGN INVENTION—Communication from abroad - - - - 307
See Patent. 4.

FOREIGN JUDGMENT—*Jurisdiction—Nationality—Foreign Subject—Succession to Property—Decision of Foreign Tribunal—Swiss Court at Zurich—Comity of Courts—Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 6.*] Although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which he was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and may in such a case be bound to ascertain as best they can who according to the law of the domicil are entitled to the estate, yet where the title has been adjudicated upon by the Courts of the domicil, such adjudication is binding upon and must be followed by the Courts of this country (*Enohin* v. *Wylie* (10 H. L. C. 1); *Ewing* v. *Orr Ewing* (10 App. Cas. 453); *Doglioni* v. *Crispin* (Law Rep. 1 H. L. 301)); even if the judgment of the foreign

FOREIGN JUDGMENT—*continued.*
Court has by the default of the party complaining of the judgment proceeded on a mistake as to the English law (*Castrique* v. *Imrie* (Law Rep. 4 H. L. 414); *Godard* v. *Gray* (Law Rep. 6 Q. B. 139)), or the whole of the facts were not before the foreign tribunal (*De Cosse Brissac* v. *Rathbone* (6 H. & N. 301)); for the Courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal is wrong, recourse must be had to the mode of appeal provided in the foreign country (*Bank of Australasia* v. *Nias* (16 Q. B. 717)).—A testator who was by birth a British subject, and was the father of the Plaintiff, went to reside in Switzerland, and in the year 1842 acquired the "Landrecht" or "Indigenat" in the canton of Zurich, without being required to renounce his English nationality, which in the then state of English law he could not have effectually done; and he thereby became of Swiss nationality. With the sanction of the cantonal authorities he could have relinquished this "Landrecht" or "Indigenat," but he never effectually did so, although he afterwards left Switzerland and went to reside in France, where he died with a French domicil in the year 1878:—*Held*, that the 6th section of the Naturalization Act, 1870, applied to the testator; that at the time of his death he was a Swiss, and not a British subject; and that having regard to the French law, under which the Swiss tribunals were the proper forum, the Courts of Zurich had jurisdiction to decide upon the right of succession to his personal estate:—*Held*, also, that notwithstanding an attempted disposition by the testator of the whole of his personal estate in favour of a stranger, the Plaintiff was, in accordance with a judgment of the Courts of Zurich, entitled as the testator's only child to nine-tenths of such estate as his compulsory portion. *In re* TRUFORT. TRAFFORD *v.* BLANC - - - - 600

FOREIGN LAW—Waste - - - 269
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FRAUD—Imitation of Plaintiff's goods—Injunction - - - - - 1
See PRACTICE. 5.

—— Undue influence - - - 145
See UNDUE INFLUENCE.

GENERAL ORDER UNDER SOLICITORS' REMUNERATION ACT, AUGUST, 1882, r. 2, Sched. 1, Pt. 1, r. 11 - - 566
See SOLICITOR. 2.

HUSBAND AND WIFE—*Married Woman—Restraint on Anticipation—Conveyancing and Law of Property Act*, 1881, *s.* 39.] Order enabling a married woman to mortgage a life interest as to which she was restrained from anticipation made without requiring the trustees to be served. *In re* LITTLE'S WILL. *In re* HARRISON - C. A. 701

INDEMNITY—Trustee—Shares in company 256
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INFANT—Statute of Limitations—Receipt of rents by father - - - 553
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INJUNCTION — Canal company — Injury from water - - - - 626
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—— Imitation of Plaintiff's goods - - 1
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—— Interlocutory—Balance of convenience 425
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—— Restrictive covenant - - - 243
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JURISDICTION—High Court of Justice—Lands Clauses Act - - - 650
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—— Judges of Appeal Court—Lunacy - 410
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—— Judgment of foreign Court—Foreign subject - - - - - 600
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—— Lunacy—Customs Annuity and Benevolent Fund - - - - 55
See CUSTOMS ANNUITY FUND. 1.

LAND IMPROVEMENT COMPANY — Invalid charge—Advance to corporation—Ultra vires - - - - - 674
See CORPORATION.

LANDS CLAUSES ACT—*Injunction—Lands injuriously affected—Public Body—Ultra vires—Act of Parliament — Construction — Repeal — Public Undertaking—Easement—Ancient Lights—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.] By an Act incorporating the Lands Clauses Consolidation Acts the Metropolitan Board of Works were authorized to acquire specified land for the purpose of (among others) the G. street improvement, and to purchase easements over such land. By sect. 33 of their Act they were required to sell or let specified portions of the land for the construction and maintenance of artizans' dwellings, so that the land should be cleared of existing houses by degrees and a minimum number of dwellings should be provided. By an Amendment Act the Board were required to devote three plots of land, the subject of the G. improvement, to provide a minimum number of artizans' dwellings, and sect. 33 of the principal Act was repealed with respect to the G. improvement:—*Held* (1), that provisions as to selling and letting similar to those contained in sect. 33 of the principal Act were implied by the Amendment Act. (2) That an adjoining owner had no right to an injunction to restrain a tenant of the Board from obstructing ancient lights by building artizans' dwellings on one of the plots of land devoted to that purpose, but that his right was to compensation from the Board under sect. 68 of the Lands Clauses Consolidation Act, 1845. (3)

LANDS CLAUSES ACT—*continued.*
That the Board could not impose on their tenant a liability to be restrained from building the artizan's dwellings so as to obstruct access of light to ancient lights. Wigram *v.* Fryer - - 87

2. —— *Railway Company—Notice to treat—Disputed Interest—Action by Landowner for Declaration of Title—Jurisdiction of High Court.*] A., in possession of land under a building agreement, which required the houses to be erected by November, 1885, was in 1882 informed by a railway company of their intention to obtain a special Act to extend their railway system, which scheme would affect his land. A. thereupon arranged with his landlord for an extension of the time limited by his agreement—no definite period being fixed—and suspended his building operations. The company obtained their special Act in 1883, and in 1884 gave A. the usual notice to treat for part of the land comprised in his building agreement, but A. sent in no claim under the notice. In 1886 the company took adverse possession of the land in question, treating the building agreement as at an end, and insisting that A. had no interest whatever in the land. On action brought by A. against the company for a declaration that the building agreement was still subsisting, and that he was entitled to have his interest thereunder assessed in the usual way:—*Held*, that the jurisdiction of the Court was not ousted by the procedure under the Lands Clauses Consolidation Act, 1845, and that A. was entitled to the declaration he claimed.—*East and West India Docks Company* v. *Gattke* (3 Mac. & G. 155) and *London and Blackwall Railway Company* v. *Cross* (31 Ch. D. 354) distinguished. Birmingham and District Land Company *v.* London and North Western Railway Company - - 650

LEASE — Agreement to make agreement for—Specific performance - - 695
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—— Charitable use - - - - 9
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LIGHT—Public body—Authority of statute 87
See Lands Clauses Act. 1.

LIMITATIONS, STATUTE OF—*Tenants in Common—Receipt of Rents by Father as Bailiff for Infant Son—3 & 4 Will. 4, c. 27, s. 12.*] A father was entitled in fee to an undivided moiety of gavelkind land, the other moiety of which belonged to his wife in fee. She died in May, 1870, leaving two sons, Samuel and John. John was then an infant. He attained twenty-one in 1877 and died in May, 1884. On the mother's death her moiety descended to her two sons in equal shares, as her co-heirs by the custom of gavelkind, but the father was by that custom entitled to a moiety of the rents of her moiety so long as he remained a widower. On the mother's death he entered into the receipt of the whole of the rents of her moiety, and continued in possession, without accounting to his sons or acknowledging their title in writing, for more than twelve years. On the death of John in 1884 his interest descended to his brother Samuel as heir of the mother. In February, 1884, the father had married a second wife, and in November, 1884, he died:—*Held*, that, as to that one-eighth of the property to which John became entitled in possession on the death of his mother, the father must be taken to have entered into receipt of the rents as bailiff for his infant son, and that, consequently, the title of John was not barred by sect. 12 of the Act 3 & 4 Will. 4, c. 27, and that his brother Samuel was entitled to that one-eighth.—But *held*, that, as to Samuel's own one-eighth the same presumption did not arise, and that, there being no evidence that the father had received the rents as agent for Samuel, or had before the expiration of the statutory period acknowledged his title in writing, or accounted to him for the rents, the title of Samuel to that one-eighth was barred by the statute.—Consequently, Samuel was entitled to three-eighths of the whole property and the remaining five-eighths passed under the father's will. Hobbs *v.* Wade [553

LIQUIDATOR—Removal of - - - 299
See Company. 7.

LOCAL AUTHORITY—Public nuisance - 593
See Public Health Act.

LUNATIC—*New South Wales—Person in New South Wales of Unsound Mind not so found by Inquisition—Payment to Master in Lunacy in New South Wales—New South Wales Lunacy Act, 42 Vict. c. 7.*] A lady detained in a lunatic asylum in New South Wales, but not found a lunatic by inquisition, was entitled for life to the income (about £30 a year) of one third of a testator's residuary estate, and was absolutely entitled to a fund of about £2000 which had arisen from accumulations of this income. She had for years been maintained by the colonial government at a total expense of £803. By the New South Wales Lunacy Act extensive powers of management of the property of "lunatic patients" (i.e., persons detained as lunatics but not found so by inquisition) were given to the master in lunacy of New South Wales, and he was enabled to sue for and receive debts due to the patient, but the Act did not vest the patient's property in him. The Master claimed to have the accumulations, which were in England, paid to him, upon which the trustees paid them into Court under the Trustee Relief Act. The Master petitioned to have them paid out to him. Kay, J., ordered payment to him of the £803, and also payment to him of the income of the remainder of the fund so long as the patient should be detained as an insane patient in New South Wales, and authorized the trustee to pay to him the patient's share of the income of the residuary estate, which the trustee undertook to do. The Master in Lunacy appealed:—*Held*, that although the Master could enforce payment in New South Wales of any sums due to the patient, still, as the patient had not been found lunatic, and her property was not vested in the Master, he could not compel payment of any moneys due to the patient from persons in this country, and that his claim as of right to have the whole of the accumulations made over to him could not be sustained:—But *held*, that a trustee here, or the Court acting as trustee, was justified in paying over to the Master

LUNATIC—*continued.*
anything which the competent authority in New South Wales decided to be necessary for the maintenance or benefit of the patient, and that the order therefore was right in ordering the payments which had been directed:—But *held*, that it was also right in declining to go further, no case having been made to shew that more was required for the comfort or benefit of the patient. *In re* Barlow's Will - - - **C. A. 287**

2. —— *Pauper—Guardians of the Poor—Past Maintenance—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Lunatic Asylums Act*, 1853 (16 *&* 17 *Vict. c.* 97), *s.* 104.] Under sect. 104 of the Lunatic Asylums Act, 1853, the guardians of the poor of a parish to which a pauper lunatic is chargeable are entitled in the event of his becoming entitled to property to recover only six years' arrears in respect of the sums paid by them for his maintenance in an asylum. *In re* Newbegin's Estate. Eggleton *v.* Newbegin 477

—— Subscriber to Customs Annuity Fund 55
See Customs Annuity Fund. 1.

MAINTENANCE—Lunatic - - - - 477
See Lunatic. 2.

MANAGER OF COMPANY—Authority to sign promissory note - - - 532
See Principal and Agent.

MAXIM OF LAW—Actio personalis moritur cum personâ - - - - 269
See Waste.

METER—Water company - - - 641
See Water Company.

MORTGAGE—*After-acquired Property—Uncertainty—Divisible Agreement—Property under any Settlement or Will.*] A mortgagor by deed assigned to the mortgagee all his household goods and farming stock, and "also all moneys of or to which he then was or might during the security become entitled, under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of any person;" and also all real and personal property "of, in, or to which he was or during that security should become beneficially seised, possessed, entitled, or interested, for any vested, contingent, or possible estate or interest."—The mortgagor afterwards became entitled under a will to a share of the personal estate of the testator:—*Held*, that the assignment of after-acquired property was divisible; and that although the general assignment of all property to which the mortgagor might become entitled might be too wide, as to which the Court gave no decision, the assignment for valuable consideration of all moneys to which he should become entitled under a will operated as a contract which the Court would enforce, and that the share of the personal estate of the testator was accordingly included in the mortgagor's security. —*Belding* v. *Read* (3 H. & C. 955) questioned.—The decision of Kay, J., affirmed. *In re* Clarke. Coombe *v.* Carter - - - **C. A. 348**

2. —— *Bank—Loan to Customer—Transfer by three Persons to secure Loan—Re-transfer to Nominee of Customer—Liability of Bank for consequent Loss.*] G., a stockbroker, who was one of three trustees, proposed to his co-trustees to sell certain B. stock belonging to the trust and purchase N. E. stock with the proceeds. In order to carry out this change of investment the co-trustees concurred with G. in executing a deed of transfer of the B. stock. The transfer was for a nominal consideration in favour of two persons named, who were in fact trustees for a bank of which G. was a customer. G. handed the transfer to the bank as part security for a loan by them to him. The bank believed that G. had authority to pledge the stock with them. The transfer was duly registered, after the usual notices had been sent to the transferors. G. paid off the loan, and the bank, instead of causing the stock to be re-transferred to the three transferors, and without giving notice to the co-trustees of G., caused the stock to be transferred to purchasers from G. G. received the purchase-money, and therewith bought N. E. stock, but in his sole name; he afterwards sold such stock and appropriated the proceeds to his own use. In his accounts subsequently delivered to his co-trustees, he included the N. E. stock as part of the trust funds, and he from time to time paid to the cestuis que trust sums by way of dividend on such stock. He subsequently absconded, and became bankrupt. In an action by his co-trustees against the bank:—*Held*, that the bank when the loan was paid off were in a fiduciary position towards the three mortgagors, and were bound to take care that the B. stock was re-transferred to them or to some one to whom they authorised it to be re-transferred; that the authority conferred on G. by the transfer executed by his co-trustees was at most an authority to sell to the bank or their trustees; that therefore the act of the bank in transferring to the nominees of G. was a breach of their duty to the mortgagors; that such breach of duty was the cause of the loss by depriving the trust of the B. stock and enabling G. to act as he did, and that the bank were liable for the value of the B. stock at the time when they transferred it. Magnus *v.* Queensland National Bank - - 25

3. —— *Redemption Action—Mortgagee in Possession overpaid—Annual Rests—Costs.*] In a redemption action against mortgagees in possession the Plaintiffs, who claimed to represent the original mortgagor, alleged that the Defendants had been overpaid. The Defendants by their statement of defence denied the title of the Plaintiffs to redeem; pleaded the Statute of Limitations; and asserted that a large amount was still due to them. At the trial the Plaintiffs' title to redeem was not disputed, and the defence of the statute was overruled.—The judgment directed the taking of the ordinary accounts in a redemption action against mortgagees in possession, including an account of what was due to the Defendants for principal and interest, and their taxed costs of the action; and that, on payment by the Plaintiffs within six months after the certificate of the balance (if any) which should be found due to the Defendants, the Defendants should reconvey the mortgaged property to the Plaintiffs, and that, in default of payment, the action should be dismissed with costs. But, in case it should appear on taking the accounts that the Defendants had

MORTGAGE—*continued.*

been overpaid, the further consideration of the action was to be adjourned. The Chief Clerk found by his certificate that the mortgagees went into possession in May, 1857; that the mortgage debt was fully repaid in November, 1866; and that at the date of the certificate there was a balance of £618 due from the Defendants:—*Held*, that the account must be taken against the Defendants with annual rests from the date at which the mortgage debt was fully paid:—*Held*, also, that the Defendants must pay the costs of the action.—*Wilson* v. *Metcalfe* (1 Russ. 530) followed as to the annual rests, but distinguished as to the costs. ASHWORTH *v.* LORD - - - 545

—— Redemption action—Counter-claim—Particulars - - - - 505
See PRACTICE. 7.

—— Set-off—Balance of mortgaged property 223
See SET-OFF.

MORTGAGEE IN POSSESSION—Accounts 545
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MORTMAIN - - - - - - 9
See CHARITY.

NEGLIGENCE—Canal company—Compensation under Act - - - - 626
See CANAL COMPANY. 1.

NEW RIVER COMPANY - - - 641
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NEW SOUTH WALES LUNACY ACT—Person of unsound mind - - - 287
See LUNATIC. 1.

NOVELTY—Patent—Combination - - 740
See PATENT. 3.

NOTICE TO TREAT - - - - - 650
See LANDS CLAUSES ACT. 2.

NUISANCE—Public nuisance—Local authority
See PUBLIC HEALTH ACT. [593

OYSTER FISHERY - - - - 329
See COMPANY. 5.

PARTICULARS—Mortgage action - - 505
See PRACTICE. 7.

PATENT—*Action to restrain Threats of Legal Proceedings by Patentee—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32 —*Interlocutory Injunction—Balance of Convenience and Inconvenience.*] C., a patentee, brought an action under sect. 32 of the Patents Act of 1883 against R., a prior patentee of a similar invention, to restrain R. from issuing threats of legal proceedings against persons selling C.'s patent articles. Shortly after C. had sued out his writ, but before it had been served, R. had commenced an action for infringement against the P. Co., who were selling C.'s articles:—*Held*, that the action mentioned in the proviso to sect. 32 as taking a case out of the section need not be an action against the person who is suing to restrain the threats, but that an action for infringement honestly brought with reasonable diligence against any of the persons who have been threatened will, if duly prosecuted, satisfy the proviso:—*Held*, that in considering whether such an action is brought with due diligence, the time of issuing the threats, and not the time when the party bringing the action first knew of the acts which he alleges to be infringements, is the period to be looked to.—In order to obtain an interlocutory injunction the plaintiff must make out a primâ facie, i.e., a case such that if the evidence remains the same at the hearing it is probable that he will obtain a decree, and unless he makes out such a case an injunction will not be granted on the mere consideration of the balance of convenience and inconvenience.—*Semble*, in an action under sect. 32 of the Patents Act, 1883, to restrain a patentee from issuing threats, the validity of the defendant's patent may be called in question.—*Kurtz* v. *Spence* (33 Ch. D. 579) disapproved. CHALLENDER *v.* ROYLE - - **C. A. 425**

2. —— *Action for Injunction against Threats —Validity of Defendant's Patent—Amendment—Delay—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] In an action under sect. 32 of the Patents Act of 1883 to restrain a patentee from issuing threats, the Plaintiffs in their statement of claim alleged that the Defendants' patent was invalid. Chitty, J., ordered this allegation to be struck out (33 Ch. D. 579), being of opinion that the validity of the Defendants' patent could not be tried in such an action. After nearly a year, the time for appealing against that order having long expired, the Plaintiffs applied to Kekewich, J., to whom the action had been transferred, for liberty to amend the statement of claim by inserting an allegation that the Defendants' patent was invalid. Kekewich, J., refused the application, and the Plaintiffs appealed:—*Held*, by Cotton and Bowen, L.JJ., that liberty to amend ought to be given but upon special terms, in order that the Defendants might not suffer any loss by the Plaintiffs not having taken the proper course of appealing in due time from the order of Chitty, J. Dissentiente Fry, L.J., who was of opinion that though, having regard to the opinion expressed in *Challender* v. *Royle* (36 Ch. D. 425), the amendment was in itself proper, it was not competent to the Court to allow it, when doing so was inconsistent with and substantially reversed an order of Chitty, J., which was not liable to be appealed from. KURTZ *v.* SPENCE - - - - **C. A. 770**

3. —— *Combination—Novelty of Parts—Infringement of Patent for Combination—Acquiescence —Estoppel.*] Where a patent is taken out for a combination, it is not material to its validity that the specification should point out what parts are old and what are new, though, if an alleged infringement consists only in taking part of the combination, it is necessary that the patentee should in his specification have claimed the part so taken as new. Neither is it necessary that the patentee should explain the novelty and the merit of the invention.—*Foxwell* v. *Bostock* (4 D. J. & S. 298) explained.—A patent for a combination of known mechanical contrivances producing a new result, held to be infringed by a machine producing the same result by a combination of mechanical equivalents of the above contrivances, with some alterations and omissions, which did not prevent the new machine from being one which took the

PATENT—*continued.*

substance and essence of the patented invention. —*Curtis* v. *Platt* (3 Ch. D. 135, n.; 35 L. T. (Ch.) 852) distinguished on the ground that there the result was old, and the novelty of the invention consisting only in improvements in a known machine for producing that known result, the patentee was to be tied down strictly to the mode which he had described of effecting the improvements.—In an action by P., patentee of a stoking machine, for infringement against persons who had purchased stoking machines made by B., it was proved that before the purchase P., knowing that they were going to set up stoking machines, went to them and asked them to try his machine, saying that they would find it a better machine than B.'s, without giving any intimation that he considered B.'s machine to be an infringement of his patent, though he admitted that he did at that time consider it to be so and intended to take legal proceedings when he was in funds:—*Held*, by the Vice-Chancellor of the County Palatine, that P. had by his conduct debarred himself from relief against the purchasers:—*Held*, on appeal, that as the purchasers did not depose that when they bought B.'s machines they were ignorant of P.'s patent, nor was there any reason to believe that they were ignorant of it, or that P. supposed them to be so, P. had not on the ground of acquiescence or estoppel lost his right to sue them for an infringement in using B.'s machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, and P.'s conduct not amounting to a representation that it was not an infringement. PROCTOR *v.* BENNIS **C. A. 740**

4. —— *Petition for Revocation — Alleged Fraud on Right of Petitioner—Non-disclosure on Specification of Fact of Communication from Abroad—Parties—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57) *s.* 26, *sub-s.* 4 (*c*), (*d*).] Sect. 26, sub-sect. 4 (*c*), of the Patents, Designs, and Trade Marks Act, 1883, applies only to fraud, and will not be extended to cases of mistake, though the consequences may be to deprive the inventor of his patent rights.—A., a subject of the United States of America, and resident there, gave a power of attorney to W., his agent in England, with instructions to obtain a patent in this country. W. employed L. as his substitute under the power of attorney to obtain the patent, and L. took out a patent in his own name for the invention together with some improvements which he had made himself, without stating in the specification that it or any part of it was a communication from abroad; and made a statutory declaration that he was himself the first and true inventor. L. had no fraudulent intention in taking out the patent in this form, and acted under the advice of a competent patent agent.—A petition was presented under the Patents, Designs, and Trade Marks Act, 1883, s. 26, sub-s. 4 (*c*), by K., an attorney appointed by A., alleging that the patent was granted "in fraud of the rights of A.," and asking for the revocation of the patent, and a declaration that A. was the first and true inventor.—The petition contained no distinct allegation that A. was the first and true inventor. The petition was ordered by Stirling, J., to be amended by making A. sole petitioner, and all persons beneficially interested in the patent respondents:—*Held*, by the Court of Appeal (affirming the decision of Stirling, J.), that, even if the patent was void by reason of the non-disclosure in the specification of the communication from abroad, as there was no proof of any intention on the part of the patentee to deprive A. of his rights, the petition could not be sustained under clause (*c*); and it was dismissed without prejudice to any petition which A. might be advised to present under clause (*d*) as a person claiming to be the first and true inventor.—But the Court gave no opinion on the question whether the patent was or was not void. *In re* AVERY'S PATENT - **C. A. 37**

PAUPER LUNATIC - - - - **447**
See LUNATIC. 2.

PETITION—Winding-up—Supervision order **563**
See COMPANY. 6.

PRACTICE—*Attachment for Default in Payment of Money—Solicitor—Receiving Order in Bankruptcy—Jurisdiction—Discretion—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 4—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10.] *Held*, by North, J., that an attachment against a solicitor for his default in the payment of a sum of money, which he has been ordered to pay in his character of an officer of the Court, is not a merely civil process, but is in its nature punitive or disciplinary, and therefore the fact that a receiving order in bankruptcy has been made against the solicitor is not of itself a sufficient reason for refusing to issue an attachment against him in such a case; but, that when such an order for the payment of money has been made against a solicitor before the making of a receiving order against him, and he has not obeyed it, the Court has, under sect. 10 of the Bankruptcy Act, 1883, a discretion whether it will order an attachment to issue by way of punishment to the solicitor, and it will decline to do so if it is satisfied that the person who asks for the order can derive no benefit from it, and that the making of it will embarrass the bankruptcy proceedings.—*Held*, also, that sect. 9, sub-sect. 1, of the Bankruptcy Act, 1883, does not apply to proceedings pending against a debtor at the time when a receiving order is made against him.—*Held*, on appeal, that the Court of Appeal would not interfere with the discretion of the Court below. *In re* WRAY [**C. A. 138**

2. —— *Attachment—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-ss.* 3, 4—*Solicitor—Town Agent—Fiduciary Capacity.*] A solicitor, the London agent of a country solicitor, made default in payment of a sum ordered to be paid by him in an action for an account of his agency:—Per North, J.:—The Defendant was liable to imprisonment under sect. 4, sub-sect. 3, of the Debtors Act, 1869, as a person acting in a fiduciary capacity, but not liable under sect. 4, sub-sect. 4, as a solicitor ordered to pay in his capacity of officer of the Court. LITCHFIELD *v.* JONES - **530**

3. —— *Costs—Administration—Ascertaining Class—Trustee Relief Act.*] Executors by payment into Court under the Trustee Relief Act of a sum to answer a legacy to a class, cannot

PRACTICE—*continued.*

thereby relieve the general residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled under the bequest. *In re* Gibbons' Will - - 486

4. —— *Costs of Separate Defences—Taxing Master's Discretion—Refresher—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 27, *sub-rr.* 29, 48.] An action to set aside, on the ground of fraud, the sale of a life interest to C. and B., on behalf of themselves and four other Defendants, was dismissed by the House of Lords with costs, and it was ordered that in taxing the costs the Taxing Master should consider whether any of the Defendants who appeared separately had sufficient reason for severing, and if and in so far as it should appear that they had not, then the Taxing Master should allow only one set of costs, or only as many sets of costs as he should think right. The Taxing Master allowed the six Defendants costs of separately defending :—*Held*, by North, J., that there was no appeal from the discretion of the Taxing Master :—*Held*, on appeal, that as the House of Lords had delegated to the Taxing Master the decision of the question how many sets of costs should be allowed, no appeal would lie from his decision unless he altogether omitted to exercise his discretion.—A trial lasted four days and three hours; on the fifth day the Judge required further hearing on one point, which occupied the whole of a subsequent day. Refreshers for such subsequent day were allowed. Boswell *v.* Coaks - - - C. A. 444

5. —— *Injunction—Imitation of Plaintiffs' Goods—Form of Account.*] The Defendants, who were soap manufacturers, brought out their soap in packets so closely resembling those in which the Plaintiffs, who were also soap manufacturers, had been in the habit of bringing out their soap, as to be calculated to deceive purchasers :—*Held*, by Chitty, J., that although the retail dealers who bought soap from the Defendants would not be deceived, the Defendants by their imitation of the Plaintiffs' packets put into the hands of the retail dealers an instrument of fraud, and ought to be restrained by injunction. An injunction was accordingly granted, and an account was directed of the profits made by the Defendants in selling soap in the form in which it was held that they were not entitled to sell it :—*Held*, on appeal, that the injunction had been rightly granted, and that the account was in the proper form, and ought not to be limited by excluding from it soap which the retail dealers sold to persons who bought it as the Defendants' soap. Lever *v.* Goodwin - - C. A. 1

6. —— *Lunacy—Jurisdiction of Judge of Appeal Court to make Orders in the Chancery Division—Judicature Act*, 1873, *s.* 51.] The letter of the Lord Chancellor requesting the Judges of the Court of Appeal sitting in Lunacy to act as additional Judges of the Chancery Division is not limited to petitions under the Trustee Acts, but applies to all applications in Lunacy which require also an exercise of the jurisdiction of the Chancery Division. *In re* Platt - C. A. 410

7. —— *Mortgage — Foreclosure—Particulars of Receipts.*] It was alleged by a counter-claim to a redemption action that the mortgage comprised: (1) Certain commission; (2) a sum also secured by bills of exchange; (3) a sum due on open account, and that the mortgagee had received divers sums in respect of the bills of exchange and on the open account. The mortgagee counter-claimed for an account and foreclosure or sale. Particulars of the sums received by him on the bills of exchange and open account were ordered to be given. Kemp *v.* Goldberg - - 505

8. —— *Service out of the Jurisdiction—Contract to be performed within the Jurisdiction—Rules of Supreme Court*, 1883, *Order* XI., *r.* 1; *Order* II., *r.* 5—*Appendix A.*, *Part I.*, *Form* 9.] R., an American residing in England for the purposes of his business, brought an action against C., an American resident in America, to enforce a contract by C., made in England, to transfer to R. shares in an English company. Bacon, V.C., gave leave to issue the writ, and serve notice of it in America. More than a year afterwards the Defendant, without giving any sufficient reason for his delay, applied to discharge the order for service on the ground that there were incorrect statements in the affidavit on which it was obtained; that the order giving leave, though noted on the writ, was not mentioned in the notice; and that there was no jurisdiction to order service abroad, as the contract was not one which according to its terms ought to be performed within the jurisdiction :—*Held*, that Order XI., r. 1, sub-sect. (*e*), does not require that a contract should state in terms that it is to be performed within the jurisdiction, but that it is enough if it appears, from a consideration of the terms of the contract and the facts existing when the contract was made, that it was intended to be performed within the jurisdiction.—*Held*, that a contract made in England to transfer shares in an English company to a person resident in England was a contract which, according to its terms, ought to be performed within the jurisdiction,—*Held*, that the omission to copy in the notice the order giving leave to issue the writ and serve notice of it, was not such an informality as to make the service invalid.—*Held*, that after the lapse of a year the Defendant was too late to raise any objection to the order on the ground that the affidavit on which it was obtained did not fairly state the facts.—*Held*, therefore (affirming the decision of Kay, J.), that the order for service abroad ought not to be discharged. Reynolds *v.* Coleman - - - - - C. A. 453

9. —— *Striking out Pleadings—Rules of Supreme Court*, 1883, *Order* XXV., *r.* 4—*Dismissal of Action—Sovereign Power—Acts of de facto Government—Attempted Repudiation by de jure Government.*] The power given by Order XXV., r. 4, of ordering any pleading "to be struck out on the ground that it discloses no reasonable cause of action," will be exercised where, in the opinion of the Court, there is no reasonable prospect that the case raised by the pleading will succeed at the hearing of the action; *secus*, where the pleading, though it might under the former practice have been open to demurrer, presents a substantial case.—A statement of claim which sought relief on the footing that a compromise of certain disputes between a foreign de facto government

PRACTICE—*continued.*
(recognised by this country) and the Defendants was not binding upon Plaintiffs, the succeeding de jure government, was ordered to be struck out, on the grounds (1) that the acts of the de facto and recognised government by their duly authorized agents must be treated by the tribunals of this country as binding upon their de jure successors; and (2) that the de jure government after retaining with full knowledge of the facts the money paid to their predecessors as one of the terms of compromise could not afterwards repudiate the arrangement.—Applications under Order xxv., r. 4, must be tried upon the allegations contained in the pleading, and evidence in support of the applicant's case is not admissible. Republic of Peru *v.* Peruvian Guano Company [489

—— Amendment of statement of claim—Patent action—Delay - - - 770
See Patent. 2.

—— Chambers—Rehearing - - - 299
See Company. 7.

—— Costs on higher or lower scale - 359
See Restraint of Trade. 3.

—— Costs—Taxation—Shorthand notes - 262
See Solicitor. 3.

—— Costs—Taxation—Summons to review 194
See Solicitor. 4.

—— Inspection of banker's books—Ex parte order - - - - 731
See Evidence. 1.

—— Transfer—Insolvent estate - - 233
See Bankruptcy.

PRESUMPTION—Death of person not heard of for seven years - - - 586
See Evidence. 2.

PRINCIPAL AND AGENT—*Authority of Agent—Manager of Trading Company abroad—Promissory Note purporting to be signed on behalf of Company.*] The business of a company was that of importers and dealers in tinned ox-tongues and other provisions. Hunter was appointed manager of the company's business in South America, "to take the entire charge of the interests of the company there." No express authority was conferred on him to sign or accept bills or promissory notes on behalf of the company. He was desirous of entering into a contract with one Liberos for the supply of ox-tongues to the company in South America. Liberos refused to enter into a contract unless a guarantee was given by some third person, and, at the request of Hunter, J. C. Simpson agreed to give the required guarantee, which he did by depositing £1000 in a bank to the order of Liberos. As a counter-security to Simpson, Hunter gave him a promissory note for £1000, signed by him "in representation of" the company. The company made default in carrying out the provisions of the contract with Liberos, and, under a power contained in it, he forfeited the deposit, which was paid over to him by the bank. No goods were supplied to the company under the contract. The company never recognized the promissory note, and it was dishonoured at maturity. The company being in liquidation, Simpson claimed to prove in the winding-up upon

PRINCIPAL AND AGENT—*continued.*
the note:—*Held*, that, it not being shewn that the giving of the note was necessary for the carrying on of the business of the company, or that it was in the ordinary course of the business of such a company, the note was not binding upon the company, and the claim in respect of it could not be admitted. *In re* Cunningham & Co., Limited. Simpson's Claim - - 532

PRIORITY—Bankruptcy of actuary of savings bank - - - - - 573
See Administration.

PROMISSORY NOTE—Authority to sign—Manager of company - - - 532
See Principal and Agent.

—— Voluntary gift - - - - 541
See Voluntary Gift.

PUBLIC HEALTH ACT—*Public Nuisance—Action for Injunction—Local Authority—Right to sue—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), s. 107—*Want of Parties—Attorney-General.*] The Public Health Act, 1875, enacts in sect. 107 that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, "cause any proceedings to be taken" against any person in any Superior Court of Law or Equity to enforce the abatement or prohibition of any nuisance under the Act:—*Held*, that such proceedings must be ordinary proceedings known to the law, and that in the absence of special damage a local authority cannot sue in respect of a public nuisance except with the sanction of the Attorney-General by action in the nature of an information. Wallasey Local Board *v.* Gracey [593

PUBLIC POLICY—Restraint of trade 359, 465
See Restraint of Trade. 2, 3.

RAILWAY COMPANY—Notice to treat - 650
See Lands Clauses Act. 2.

RATEABLE VALUE—Water company - 641
See Water Company.

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RESTRAINT OF TRADE—*Agreement not to carry on the Profession of a Surgeon—Acting as Assistant.*] M. became assistant to H. & P., surgeons at N., and entered into a bond which recited that he was taken into their employment on the terms "that he should not at any time set up or carry on the business or profession of a surgeon" in N.,

RESTRAINT OF TRADE—*continued.*

or within ten miles thereof. The condition of the bond was that M. "shall not at any time hereafter directly or indirectly, and either alone or in partnership with or as assistant to any other person or persons carry on the profession or business of a surgeon" in N. or within ten miles thereof. The partnership having been dissolved, both partners continued to practise in N., and H. engaged M. as his assistant at a salary. P. brought his action to restrain M. from acting as such:—*Held*, that as the agreement recited in the bond was for the protection of the business carried on by H. & P., and they had in the business a joint interest during the partnership, and several interests in the event of a dissolution, the agreement must be taken to be several as well as joint, and that P. could sue alone for a breach of it:—*Held*, also, that there had been a breach of it, for that a person acting as a surgeon was carrying on the profession of a surgeon, although he only acted as salaried assistant to a surgeon who carried it on for his own benefit.—*Allen* v. *Taylor* (19 W. R. 556) distinguished.—*Held*, therefore, affirming the decision of Chitty, J., that an injunction ought to be granted. Palmer *v.* Mallet [**C. A. 411**

2. —— *Public Policy—Employment of Servants—Rule of Society not to employ Servants of other Members—Trade Union Act*, 1871 (34 & 35 Vict. c. 31), s. 23.] A society established for the protection of a particular trade contained a rule that no member should employ any traveller, carman, or outdoor employé who had left the service of another member without the consent in writing of his late employer till after the expiration of two years:—*Held*, by the Court of Appeal (affirming the decision of Chitty, J.), that the rule was unreasonable, in restraint of trade, and void. But, *semble*, a rule protecting the members against information gained by servants being improperly communicated to other members, if reasonably framed, would have been good.—Whether the society was to any and what extent within the Trade Union Acts, 1871 and 1876, *quære*. Mineral Water Bottle Exchange and Trade Protection Society *v.* Booth - - **C. A. 465**

3. —— *Public Policy—"So far as the Law allows"—Reasonable Limits—Costs on Higher Scale.*] On a dissolution of partnership the retiring partner, who received a large sum of money, covenanted "to retire from the partnership; and, so far as the law allows, from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." The business had been carried on at Wolverhampton and in London.—In an action by the survivor of the continuing partners and his assignees to restrain the retiring partner from carrying on a similar business in Middlesex:—*Held* (reversing the decision of Kekewich, J.), that the covenant to retire from the business so far as the law allows was too vague for the Court to enforce.—By Cotton, L.J. (Bowen and Fry, L.JJ., giving no judicial opinion):—The old rule that the law does not allow an absolute covenant in restraint of trade is still binding, and the covenant was void on that ground also.—*Held*, also, that the covenant not to trade, act, or deal, so as to directly or indirectly affect the continuing partners was personal to the continuing partners, and could not be sued upon by their assignees.—And, *semble*, it was also too vague for the Court to enforce.—The changes in the doctrine of public policy and the authorities discussed.—Costs on the higher scale according to Order lxv., rule 9, allowed. Davies *v.* Davies - - - **C. A. 359**

—— Trade union—Power to expel members **558**
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RETAINER—Solicitor—Taxation of costs **105**
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—— Restraint on anticipation — Order under Conveyancing Act - - **701**
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SET-OFF—*Mortgage—Administration Action.*] G. died insolvent, having mortgaged an estate for his own life to secure an annuity granted by himself, payable during his own life. He had also mortgaged a policy on his own life to the same mortgagees. After the death of G. the mortgagees received in respect of the policy a sum more than sufficient to satisfy the amount secured on the policy:—*Held*, that they had no right to set off the balance against the executor in respect of arrears of the annuity. *In re* GREGSON. CHRISTISON *v.* BOLAM - - - - - 223

SETTLED LAND ACT (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 6, *s.* 19—*Tenant for Life—Undivided Share.*] The tenant for life of an undivided moiety of land, where the other undivided moiety is out of settlement, cannot sell the moiety of which he is tenant for life without the concurrence of the owner of the other undivided moiety. *In re* COLLINGE'S SETTLED ESTATES 516

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SOLICITOR—*Bill of Costs—Common Order for Taxation obtained by Solicitor—Retainer.*] Where a client obtains the common *ex parte* order for the taxation of a solicitor's bill of costs, he cannot dispute his retainer to the extent of the whole of the bill, though he may do so in respect of particular items in the bill, the practice being to require the client on his application for the order to make an admission of the retainer; but where a solicitor obtains the common *ex parte* order the client is not bound by the allegation of retainer contained in the petition, and consequently may object to every item in the bill on the ground of there having been no retainer.—Consequently it is no objection to the common order when obtained by a solicitor that he knew that the clients disputed his retainer as to the whole bill. *In re* JONES - - - - - - 105

2. —— *Bill of Costs—Taxation—Scale Fee "for conducting Sale"—Auctioneer paid by Client—Solicitors' Remuneration Act,* 1881 (44 & 45 *Vict. c.* 44)—*General Order, August* 1882, *rule* 2; *Sched. I., part* 1; *r.* 11.] A solicitor was employed by the vendor in connection with a sale of property by public auction. An auctioneer was employed to sell the property, and was paid commission by the client:—*Held*, reversing the decision of the Taxing Master, that, though the solicitor was not entitled to the scale fee "for conducting the sale" prescribed by Part 1 of Schedule I. to the Remuneration Order, he was entitled to his proper charges, according to Sched. II. to the Order, in respect of any work which he had done for which the auctioneer had not been paid, and which would have been included in the "conducting" fee, if the fee had been payable. *In re Emmanuel and Simmonds* (33 Ch. D. 40) distinguished. *In re* FAULKNER - - - - - 566

3. —— *Bill of Costs—Taxation—Shorthand Notes of Evidence—Rules of Supreme Court,* 1883, *Order* LXV., *r.* 27, *sub-r.* 25.] On a taxation of a solicitor's bill of great complexity it became necessary to examine witnesses orally before the Taxing Master, who, before the examination, stated his opinion to be that a shorthand writer ought to be employed. Neither party objected, each employed a shorthand writer, and the Taxing Master stated that he should rely on the notes. More than one-sixth having been taxed off, he allowed against the solicitor half the costs of the shorthand notes of the evidence, on the ground that the parties ought to have employed one shorthand writer. The solicitor objected to the allowance of any part of the expense of the shorthand notes:—*Held*, by Stirling, J., that as the Taxing Master had authority under Order LXV., r. 27, sub-r. 25, to have witnesses examined before him, he had discretion to allow the expense of shorthand notes of their evidence:—*Held*, on appeal, that neither a Judge nor Taxing Master has jurisdiction to order a shorthand note of evidence to be taken, but that as neither party had objected to having it taken, but had acceded to the Taxing Master's view, the allowance to the successful party of the same costs as if they had agreed on one shorthand writer ought not to be disturbed. *In re* HILLEARY AND TAYLOR [C. A. 262

4. —— *Bill of Costs—Taxation—Summons to review—Certificate—Objections to Taxing Master's Finding—Rules of Supreme Court,* 1883, *Order* LXV., *r.* 27, *sub-rr.* 39, 41.] To enable the Court to entertain a summons to review a Taxing Master's certificate, where the ground of objection is to the whole of the finding generally, it is not necessary that the objections raised by the summons to his finding should have been carried in before the signing of the certificate; Order LXV., rule 27, sub-rules 39 and 41 being applicable only where particular items are objected to.—*Sparrow* v. *Hill* (7 Q. B. D. 362; 8 Q. B. D. 479) followed.—Where, under an order for taxation of a solicitor's bill of costs and cash account, the Taxing Master found that, in consequence of all accounts between the parties having been settled, there was nothing to tax, and certified accordingly, but no objections to the finding were carried in before the certificate was signed:—*Held*, that the Court had jurisdiction to entertain a summons to review the certificate. *In re* CASTLE - - - - - - 194

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TENANT IN TAIL—*Estate Tail—Enlargement of Base Fee—Covenant for further Assurance—Specific Performance of Agreement by Tenant in Tail—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 19, 47.] A tenant in tail in remainder barred his estate tail without the consent of the protector, and afterwards conveyed all his estate and interest to a purchaser, and covenanted that he would, at the request of the purchaser, his heirs or assigns, execute every such disentailing or other assurance as might be necessary to vest the premises in the purchaser, his heirs and assigns. The protector having died, the purchaser applied to the vendor to execute a disentailing deed to enlarge the base fee into a fee simple:—*Held* (affirming the decision of Kekewich, J.), that the vendor was bound to execute such a deed, for that his covenant was not confined to executing assurances to remedy any defects in the title to the base fee, but obliged him to execute an assurance to enlarge the base fee into a fee simple, and that he had power to execute an assurance which would have that effect, for that the 19th section of the Fines and Recoveries Act is not confined to cases where the tenant in tail is owner of the base fee into which his estate tail has been converted:—*Held*, also, by the Court of Appeal, that the 47th section of the Act does not interfere with the jurisdiction of the Court to decree against a tenant in tail specific performance of a contract for disentailment entered into by him, but only prevents the Court from treating the contract as being in equity a disposition taking effect under the Act so as to bind the issue in tail and remainderman. BANKES *v.* SMALL - - - - - C. A. 716

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TRADE UNION—*Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *ss.* 3, 4—*Agreement in Restraint of Trade—Direct Enforcement.*] Members of a trade association were expelled for breach of rules in restraint of trade. The association passed a resolution to wind up, with a direction to their trustees to divide the surplus assets among the persons entitled under the rules. An inquiry was directed on summons as to who were the persons entitled, and in what proportions:—*Held*, that the expelled members were properly excluded in the Chief Clerk's certificate made in answer to the inquiry. STRICK *v.* SWANSEA TIN-PLATE COMPANY [558

—— Rule of society—Restraining employment of servants - - - - 465
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TRUSTEE—*New Trustees—Appointment of separate Set of Trustees of Part of Trust Property held on distinct Trusts—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 5, *sub-s.* 1.] Sect. 5, sub-sect. 1, of the Conveyancing Act, 1882, authorizes the appointment of a separate set of trustees for a part of the trust property held on distinct trusts only when an appointment is being made of new trustees of the whole property.—It does not enable the existing trustees of the whole property to retire from the trusts as to part by means of an appointment of new trustees of that part. SAVILE *v.* COUPER - - - - - 520

2. —— *Shares—Indemnity—Action before Call—Distringas—Disclaimer.*] Certain moneys belonging to A. were invested in shares in a banking company in the joint names of A. and B., the ultimate trust being for the estate of A., who predeceased B. The company went into liquidation and calls would be made upon the shareholders, on the list of whom the executor of B. would be put:—*Held*, that the executor of B. was entitled to be indemnified by the estate of A., and might bring an action for and obtain a declaration of indemnity before he was on the list and before any call was made on him.—*Fraser* v. *Murdoch* (6 App. Cas. 855) discussed.—*Hughes-Hallett* v. *Indian Mammoth Gold Mines Company* (22 Ch. D. 561) distinguished.—By putting a distringas on shares a legatee does not accept the shares so that he cannot afterwards disclaim. HOBBS *v.* WAYET - - - - 256

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TRUSTEE ACTS—*Appointment of new Trustees—Death of sole Trustee in Lifetime of Testator—Death of Testator's Heir intestate—Form of Vesting Order—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 30] The sole trustee of land appointed by a will died in the lifetime of the testator. The testator's heiress-at-law died intestate (after the Conveyancing Act, 1881, had come into operation), and there was no representative of her estate:—*Held*, that, on a petition for the appointment of new trustees of the will, which was served on the testator's heir, an order could be made vesting the property in the new trustees for such estate as was vested in the heiress-at-law at the time of her death. *In re* WILLIAMS' TRUSTS - - - - 231

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—— Mortgage of after-acquired property - 348
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UNDUE INFLUENCE—*Convent—Rules of Poverty and Obedience—Voluntary Gift of Property—Laches—Acquiescence.*] In 1868 A. was introduced by N., her spiritual director and confessor, to S., the lady superior of a sisterhood, and became an associate of the sisterhood. N. was one of the founders and also the spiritual director and con-

UNDUE INFLUENCE—*continued.*
fessor of the sisterhood, which was an association of ladies who devoted themselves to charitable works. In 1871 A., having passed through the grades of postulant and novice, became a professed member of the sisterhood and bound herself to observe (inter alia) the rules of poverty, chastity, and obedience, by which the sisterhood was regulated, and which were made known to her when she became an associate. These rules were drawn up by N. The rule of poverty required the member to give up all her property, either to her relatives, or to the poor, or to the sisterhood itself, but the forms in the schedule to the rule were in favour of the sisterhood, and provided that property made over to the lady superior should be held by her in trust for the general purposes of the sisterhood. The rule of obedience required the member to regard the voice of her superior as the voice of God. The rules also enjoined that no sister should seek advice of any extern without the superior's leave.—A., within a few days after becoming a member, made a will bequeathing all her property to S.; and in 1872 and 1874, having become possessed of considerable property, handed over and transferred several large sums of money and railway stock to S. In May, 1879, A. left the sisterhood and immediately revoked her will, but made no demand for the return of her property until 1885, when she commenced an action against S. claiming the return of her property on the ground that it was made over by her while acting under the paramount and undue influence of S., and without any independent and separate advice:—*Held*, that although A. had voluntarily and while she had independent advice entered the sisterhood with the intention of devoting her fortune to it, yet as at the time when she made the gifts she was subject to the influence of S. and N., and to the rules of the sisterhood, she would have been entitled on leaving the sisterhood to claim the restitution of such part of her property as was still in the hands of S., but not of such part as had been expended on the purposes of the sisterhood while she remained in it:—But *held*, by the Court of Appeal (dissentiente Cotton, L.J.) (affirming the decision of Kekewich, J.), that under the circumstances the Plaintiff's claim was barred by her laches and acquiescence since she left the sisterhood. ALLCARD *v.* SKINNER - - - C. A. 145

VENDOR AND PURCHASER—*Damages—Action for Specific Performance—Costs—Delay—Right of Way—Works.*] The purchaser of a piece of land agreed, as part of the consideration, to grant within a given time to the vendor a right of way, and to make a road with sewers leading to other land belonging to the vendor. The purchaser was unable to grant the right of way or to make the road and sewers until long after the time fixed, and the vendor brought an action for specific performance and for damages, as the other land had remained unproductive until the road was made:—*Held*, that judgment for specific performance with costs must be given but no damages, as the contract was for a sale of real estate; there being no distinction between a contract to grant a right of way and make a road and sewers, and a contract to sell real estate.—Principle on which in such a case damages would be assessed discussed. ROWE *v.* SCHOOL BOARD FOR LONDON - 619

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VOLUNTARY GIFT — *Completion — Creation of Trust by Donor—Delivery of Promissory Note to be handed over after Death of Testatrix to Third Person on her fulfilling a Condition.*] A testatrix made her will in 1873, and thereby bequeathed a legacy of £150 to E. H., who was living with her as a domestic servant. In August, 1877, the testatrix handed to C., her solicitor (whom she had appointed one of her executors), a promissory note for £200, signed by herself and payable on demand to E. H., telling C. not to mention the note to any one but E. H., but to retain it till the death of the testatrix, and then to give it to E. H., if she should remain in the service of the testatrix until her death. E. H. was informed of the note soon after it had been handed to C. The testatrix had previously told E. H. that, if she would continue in her service until her death, she would leave in the care of C. a present for her, beyond what she might leave to her in her will. E. H. remained in the service of the testatrix until the death of the latter, and the promissory note continued in the possession of C. The testatrix died in 1881. She had never revoked the direction which she had given to C. about the note:—*Held*, that C. was constituted a trustee of the note, that he might after the death of the testatrix hand it over to E. H. if she had fulfilled the prescribed condition, and that, as the testatrix had never revoked the direction which she had given to C., E. H. was entitled to prove for the amount of the note in the administration of the estate of the testatrix. *In re* RICHARDS. SHENSTONE *v.* BROCK [541

—— Undue influence - - - 145
See UNDUE INFLUENCE.

WASTE—*Foreign Law—Tenant in Tail—Liability under implied Contract—Tort—Action personalis moritur cum personâ.*] The possessor of Austrian entailed estates died domiciled in, and left property in, England. By the law of Austria the possessor is under an obligation to hand over the property to the successor in as good a state as when he received it, and is liable for deterioration, whether voluntary or permissive, unless it occurs without any fault of his, and he is entitled to compensation for improvements made by him. The successor brought a creditor's action in England against the English executrix, in which it was admitted by the parties that there was some deterioration, and also that some improvements had been made. North, J., made a decree for administration with liberty to the Plaintiff to take proceedings, in the Courts of the countries in which the estates were situate, to establish the amount of his claim:—*Held* (affirming the decision of North, J.), that the objection that the Plaintiff's claim was for a tort analogous to waste, and therefore, according to English law,

WASTE—*continued.*
died with the person, and could not be enforced in an English Court, was not sustainable, for that the deteriorations were not to be regarded as torts but as breaches of an obligation in the nature of an implied contract.—But, *held*, that the accounts in an administration suit ought not to be directed till it was ascertained that a sum was due to the Plaintiff. BATTHYANY *v.* WALFORD C. A. 269

WATER COMPANY—*New River Company—Dwelling-house — Charge for Water — Rateable Value—Meter.*] A warehouse in which no one sleeps or takes meals is not a dwelling-house within the meaning of clause 35 of the New River Company's Act, 1852; and the company cannot insist on charging according to the rateable value of the warehouse for water supplied to it for domestic purposes.—The company is obliged to supply to such a warehouse water for domestic purposes and for a hydraulic lift, charging for it by meter, according to clause 41 of the Act. COOKE *v.* NEW RIVER COMPANY - - - 641

WILL — *Construction* — "*Die without leaving issue.*"] A testator bequeathed personal estate on trust after the death of W. K. B. for W. R. B., and, in case W. R. B. died without leaving issue male, for J. B. W. R. B. died in the lifetime of W. K. B., having had only one son, who died an infant in his father's lifetime:—*Held*, that the gift over to J. B. took effect.—*White* v. *Hight* (12 Ch. D. 751) not followed. *In re* BALL. SLATTERY *v.* BALL - - - - 508

2. —— *Construction*—"*Property at my Bank*"—*Share Certificates.*] Bequest of "my property at R.'s bank." At his death the testator had at R.'s bank a cash balance, also certificates of shares, some inscribed in his name and others payable to bearer:—*Held*, that the cash balance only passed under the gift of "my property at R.'s bank." *In re* PRATER. DESINGE *v.* BEARE 473

3. —— *Legacy—General or Specific—Uncertainty—Gift of Shares in Unlimited Company subsequently converted into Limited Company—Change in Value of Shares.*] A testator bequeathed "fifty shares in the York Union Banking Company," to be held upon certain trusts. At the date of the will the company was registered and incorporated as an unlimited company under the Companies Acts, and the testator held seventy shares therein of the nominal value of £100 each. Between the dates of his will and his death the company was registered as a limited company under the same style, except that the word Limited was added, and each £100 share was converted into two shares of the nominal value of £60, and 140 of these new shares were allotted to the testator in substitution for his seventy shares of £100 each:—*Held*, that the bequest was not specific but general, that it was in effect a gift of such a sum as at the death of the testator should be the value of fifty shares of £100 each in the unlimited company, and that as, by reason of events of which the testator was aware, it had become impossible to determine such value, the bequest failed. *In re* GRAY. DRESSER *v.* GRAY - - - - - - 205

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